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No. 10-10-376

In The
Supreme Court of the United States

MARK WRISLEY, et al.,

Petitioners,

v.

MICHAEL CROWE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

HORVITZ & LEVY LLP
JASON R. LITT
JAMES A. SONNE
Counsel of Record
15760 Ventura Boulevard, 18th Floor
Encino, California 91436-3000
(818) 995-0800
FAX: (818) 995-3157
jsonne@horvitzlevy.com

DALEY & HEFT LLP
RICHARD J. SCHNEIDER
GOLNAR J. FOZI
462 Stevens Avenue
Suite 201
Solana Beach, California
92075-2065
(858) 755-5666
FAX: (858) 755-7870

OFFICE OF THE CITY ATTORNEY
JEFFREY R. EPP
MICHAEL R. MCGUINNESS
OFFICE OF THE CITY ATTORNEY
201 North Broadway
Escondido, California 92025
(760) 839-4608
FAX: (760) 741-7541

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

In *Chavez v. Martinez*, 538 U.S. 760 (2003), this Court provided limited guidance on a police officer's liability for alleged constitutional errors in conducting interrogations. *Chavez* produced six opinions, none of which garnered more than four full votes. Under the controlling opinion, the Court held police can be sued only for acts that violate the "core guarantee" of the Fifth Amendment or "shock the conscience" under the Fourteenth Amendment. Specifically, the Court denied a Fifth Amendment claim where the interrogation, though lacking *Miranda* warnings, was never used in a criminal proceeding, but allowed a Fourteenth Amendment claim to go to a jury where police badgered a suspect who had just been shot in the face. The lack of a majority opinion in *Chavez*, however, has fostered a deep split of authority on:

1. Whether police are subject to liability under the Fifth Amendment for allegedly coercive questioning that is used only in pre-trial proceedings that do not impose criminal penalties.

2. Whether police are subject to liability for questioning that is excluded under the Fifth Amendment but does not constitute wrongdoing rising to a level that "shocks the conscience" under the Fourteenth Amendment.

3. Whether police can "shock the conscience" for purposes of liability under the Fourteenth Amendment by non-tortious verbal conduct that causes or threatens no physical harm.

PARTIES AND RULE 29.6 STATEMENT

Petitioners, and defendants below, are individuals Mark Wrisley; Barry Sweeney; Ralph Claytor; and Phillip Anderson (all current or former police officers for the City of Escondido, California).

Respondents, and plaintiffs below, are individuals Michael Crowe; Stephen Crowe; Cheryl Crowe; Judith Ann Kennedy (deceased); Shannon Crowe, a minor, through her guardian ad litem Stephen Crowe; Margaret Susan Houser; Gregg Houser; and Aaron Houser.

Additional defendants below, who are not parties to this petition but remain defendants, are individuals Chris McDonough (a police officer for the City of Oceanside, California) and Lawrence Blum, Ph.D.[1] Other defendants below, who are dismissed from the case but were named in the caption on appeal, are City of Escondido; City of Oceanside; County of San Diego; Rick Bass (an Escondido police officer); Summer Stephan (a San Diego prosecutor); Gary Hoover (a San Diego prosecutor); and the National Institute for Truth Verification, a Florida limited liability company.

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[1] Petitioners understand that Chris McDonough and Lawrence Blum are filing separate petitions in this matter.

PARTIES AND
RULE 29.6 STATEMENT – Continued

Additional plaintiffs below, who have been dismissed from the case but were named in the caption on appeal, are individuals Christine Huff; Zachary Treadway; Joshua David Treadway; Michael Lee Treadway; Tammy Treadway; and Janet Haskell.

All parties before this Court are individuals.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	viii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT	3
A. Jurisdiction in the First Instance	3
B. Summary of Proceedings	3
C. Factual and Procedural History	4
1. The murder of Stephanie Crowe and its investigation	4
2. The criminal proceedings	8
3. The civil suit	9
4. The district court's summary judgment orders	10
5. The Ninth Circuit opinion	12
REASONS FOR GRANTING THE PETITION	14

TABLE OF CONTENTS – Continued

Page

I. CERTIORARI SHOULD BE GRANTED TO SETTLE A BROAD AND DEEP CIRCUIT SPLIT ON THE CRITICAL QUESTION LEFT OPEN BY *CHAVEZ* AS TO WHETHER POLICE ARE SUBJECT TO PERSONAL LIABILITY UNDER THE FIFTH AMENDMENT FOR COERCIVE QUESTIONING WHENEVER THE STATEMENTS THEY OBTAIN ARE USED IN COURT 18

A. The splintered decision in *Chavez* leaves unanswered the important question of whether police are subject to personal liability for any courtroom use of coercive questioning..... 18

B. The Ninth Circuit has joined with the Second and Seventh Circuits and split from the Third, Fourth, Fifth, and Sixth Circuits in concluding that any courtroom use of an allegedly coerced confession exposes police to liability..... 20

C. Given the broad and deep Circuit split on the question, clear and consistent guidance on police liability for the pre-trial use of allegedly coercive interrogations is sorely needed by police, prosecutors, and plaintiffs alike 22

TABLE OF CONTENTS – Continued

Page

II. CERTIORARI SHOULD BE GRANTED TO GIVE NEEDED GUIDANCE TO POLICE AND THE PUBLIC ON WHAT TYPE OF ACTIVITY CAUSES POLICE TO BE EXPOSED TO CIVIL LIABILITY UNDER THE FIFTH AMENDMENT 25

A. After *Chavez*, the courts of appeal are split on whether police are subject to civil liability under the Fifth Amendment by engaging in mere coercion or a violation of *Miranda*, or whether their acts must otherwise "shock the conscience" 25

B. Given the necessary balance between effective police work and the protection of civil rights, guidance is needed on the type of activity required for police officers to be subject to civil liability under the Fifth Amendment 27

III. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER, AS THE NINTH CIRCUIT HELD HERE, VERBAL CONDUCT ALONE CAN "SHOCK THE CONSCIENCE" FOR PURPOSES OF FOURTEENTH AMENDMENT LIABILITY 30

A. The Ninth Circuit's decision, which found non-tortious verbal questioning alone can "shock the conscience," conflicts with decisions of this Court and other circuits 30

TABLE OF CONTENTS – Continued

Page

B. The Ninth Circuit's opinion, which does not require familial companionship claims under the Fourteenth Amendment to meet the "shocks the conscience" test, conflicts with existing authority and should be reviewed 34

CONCLUSION..... 36

APPENDIX

A. Opinion of the United States Court of Appeals for the Ninth Circuit (June 18, 2010).....App. 1

B. Excerpt of prior, superseded opinion of the United States Court of Appeals for the Ninth Circuit (January 27, 2010) .....App. 83

C. Opinion of the United States District Court for the Southern District of California Re: Summary Judgment Motions (February 28, 2005) .....App. 90

D. Opinion of the United States District Court for the Southern District of California Re: Summary Judgment Motions (February 17, 2004) .....App. 197

TABLE OF AUTHORITIES

Page

CASES

Aguilar v. U.S. Immigration & Customs Enforcement Div. of the Dep't of Homeland Sec., 510 F.3d 1 (1st Cir. 2007) 35

Anthony v. N.Y.C., 339 F.3d 129 (2d Cir. 2003) 35

Arizona v. Roberson, 486 U.S. 675 (1988) 28

Atwater v. City of Lago Vista, 532 U.S. 318 (2001) 28

Barker v. Estelle, 913 F.2d 1433 (9th Cir. 1990) 24

Braley v. City of Pontiac, 906 F.2d 220 (6th Cir. 1990) 17, 32

Bublitz v. Cottey, 327 F.3d 485 (7th Cir. 2003) 33

Burrell v. Virginia, 395 F.3d 508 (4th Cir. 2005) 13, 14, 21

Burton v. Livingston, 791 F.2d 97 (8th Cir. 1986) 32

Chavez v. Martinez, 538 U.S. 760 (2003) ..... *passim*

Cnty. of Sacramento v. Lewis, 523 U.S. 833 (1998) 26, 31, 33, 34, 35

Cummiskey v. Superior Court, 3 Cal. 4th 1018, 839 P.2d 1059 (1992) 24

Cunningham v. City of Wenatchee, 345 F.3d 802 (9th Cir. 2003) 34

Davis v. United States, 512 U.S. 452 (1994) 29

Draw v. City of Lincoln Park, 491 F.3d 550 (6th Cir. 2007) 33

TABLE OF AUTHORITIES – Continued

Page

Eidson v. Tenn. Dep't of Children's Servs., 510 F.3d 631 (6th Cir. 2007) 35

Frazier v. Cupp, 394 U.S. 731 (1969).....34

Giuffre v. Bissell, 31 F.3d 1241 (3d Cir. 1994) 20

Gregg v. George, 428 U.S. 153 (1976).....15

Higazy v. Templeton, 505 F.3d 161 (2d Cir. 2007).....13, 14, 21, 27, 29

Hopson v. Frederickson, 961 F.2d 1374 (8th Cir. 1992).....17, 32

Kastigar v. United States, 406 U.S. 441 (1972).....22

Lefkowitz v. Turley, 414 U.S. 70 (1973) 23

Marks v. United States, 430 U.S. 188 (1977).....15

Martinez v. Cui, 608 F.3d 54 (1st Cir. 2010).....17, 32, 35

McKinley v. City of Mansfield, 404 F.3d 418 (6th Cir. 2005) 13, 14, 21

Michigan v. Tucker, 417 U.S. 433 (1974).....23

Miller v. City of Phila., 174 F.3d 368 (3d Cir. 1999).....35

Miranda v. Arizona, 384 U.S. 436 (1966) .....*passim*

Mitchell v. Forsyth, 472 U.S. 511 (1985).....28

Murray v. Earle, 405 F.3d 278 (5th Cir. 2005).....13, 14, 16, 21, 26

Paul v. Davis, 424 U.S. 693 (1976) 31

Pearson v. Callahan, 129 S.Ct. 808 (2009).....10, 28

Pittsley v. Warish, 927 F.2d 3 (1st Cir. 1991).....32

TABLE OF AUTHORITIES – Continued

Page

Renda v. King, 347 F.3d 550 (3d Cir. 2003) .....*passim*

Robertson v. Plano City of Texas, 70 F.3d 21 (5th Cir. 1995) 32

Rochin v. California, 342 U.S. 165 (1952) 16, 30, 31

Sanford v. Stiles, 456 F.3d 298 (3d Cir. 2006) 33

Sornberger v. City of Knoxville, Ill., 434 F.3d 1006 (7th Cir. 2006) 13, 14, 19, 21

Stoot v. City of Everett, 582 F.3d 910 (9th Cir. 2009) 12, 14, 19, 20, 21

Tinker v. Beasely, 429 F.3d 1324 (11th Cir. 2005) 31, 33

United States v. Antelope, 395 F.3d 1128 (9th Cir. 2005) 22

United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) 23

Wilkins v. May, 872 F.2d 190 (7th Cir. 1989).....33

Wilson v. Lane, 526 U.S. 603 (1999).....29, 34

Withrow v. Williams, 507 U.S. 680 (1993) 23

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. V .....*passim*

U.S. Const. amend. XIV, § 1 .....*passim*

28 U.S.C. § 1254(1).....2

28 U.S.C. § 1331 3

28 U.S.C. § 1441(a).....3

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 1983 .....*passim*

Cal. Welf. & Inst. Code § 203 24

Cal. Welf. & Inst. Code § 630 24

PETITION FOR A WRIT OF CERTIORARI

Petitioners Mark Wrisley, Barry Sweeney, Ralph Claytor, and Phillip Anderson – all current or former police officers for the City of Escondido, California – respectfully seek a writ of certiorari to review the published decision of the United States Court of Appeals for the Ninth Circuit in this case. The Ninth Circuit announced its decision on January 14, 2010, and later amended its opinion twice to match the disposition section to the dispositions described in the body of the opinion. The Ninth Circuit denied rehearing on June 18, 2010.

OPINIONS BELOW

The operative (second amended) opinion of the court of appeals (Pet. App. 1-82) is reported at 608 F.3d 406. An earlier (first) amended version of the opinion is reported at 593 F.3d 841, and the original opinion is unpublished at 2010 WL 114956.[2] The two opinions of the district court that formed the basis of the court of appeals' review (Pet. App. 90-196, 197-356) are reported at 303 F. Supp. 2d 1050 and 359 F. Supp. 2d 994.

[2] The summary of changes made by the Ninth Circuit in its first amended opinion of January 27, 2010 is in the appendix. (Pet. App. 83-89.)

JURISDICTION

The court of appeals' opinion and judgment was entered on January 14, 2010, and amended on January 27, 2010 and June 18, 2010. Timely petitions for rehearing and rehearing en banc were denied on June 18, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the Constitution of the United States provides in relevant part that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself. . . ." U.S. Const. amend. V.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV, § 1.

42 U.S.C. § 1983 provides in relevant part that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and

laws, shall be liable to the party injured in an action at law. . . ."

STATEMENT

A. Jurisdiction in the First Instance

The jurisdiction of the federal district court was invoked under 28 U.S.C. § 1331, following removal by defendants under 28 U.S.C. § 1441(a) based on federal questions arising under 42 U.S.C. § 1983.

B. Summary of Proceedings

This petition arises from the defendant police officers' interrogations and arrests of three juvenile murder suspects. The district court found the officers immune from suit for alleged constitutional violations under 42 U.S.C. § 1983 because they did not violate (1) the Fourth Amendment where probable cause supported the arrests; (2) the Fifth Amendment where statements allegedly coerced from plaintiffs by the officers were not used in a criminal trial; and (3) the Fourteenth Amendment where the officers' interrogation tactics, though "not commendable," were limited to verbal conduct that did not "shock the conscience."

The Ninth Circuit affirmed summary judgment to the police on the pertinent Fourth Amendment claims. But, contrary to decisions in other circuits, the court of appeals reversed the district court on the

Fifth and Fourteenth Amendment claims, concluding that pre-trial use of coerced statements supports a civil claim for damages under the Fifth Amendment and that verbal conduct alone can "shock the conscience" for purposes of civil recovery under the Fourteenth Amendment.[3]

The panel denied rehearing. The court denied en banc review.

C. Factual and Procedural History[4]

1. The murder of Stephanie Crowe and its investigation.

On January 20, 1998, 12-year-old Stephanie Crowe was stabbed to death in her bedroom in a remote part of Escondido, California. Although the exact time of death is uncertain, plaintiffs offered evidence estimating it occurred between 10:00 and 11:00 p.m. When police arrived early the next morning,

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[3] Defendants below also included the City of Escondido, the nearby City of Oceanside and one of its police officers who helped question plaintiffs, a psychologist who also helped with questioning, and a county prosecutor. Both the district court and court of appeals rejected the claims against the cities and the prosecutor. The district court rejected the claims against the Oceanside detective and psychologist, but the court of appeals reversed.

[4] The facts here are drawn chiefly from the Ninth Circuit opinion. Where necessary, facts described by the district court that were uncontroverted by the court of appeals are also included. Because these opinions concern summary judgment, the facts are presumed true only for such purposes.

they found Stephanie's body lying partly in the doorway to her room. They found no signs of forced entry to the home. (Pet. App. 11.)

In the course of their preliminary assessment, Escondido detectives interviewed, strip-searched, and photographed Stephanie's parents, 14-year-old brother Michael, and 10-year-old sister Shannon, and took blood samples from the parents. The police then put Michael and Shannon in protective custody out of fear that someone living in the Crowe home may have killed Stephanie. (Pet. App. 12-13.)

On the night of the murder, neighbors of the Crowes reported that a transient, Richard Tuite, was in the area and was acting disturbed. Police questioned Tuite the next day, but nonetheless suspected an "inside job" based on other evidence. (Pet. App. 13, 51; *see* Pet. App. 142-144.) This evidence included (a) the state of the windows and doors, which were locked or appeared unusable without being seen; (b) no family member claiming to have heard an intruder; and (c) Stephanie being found in non-sleep attire and yet no screams were heard, suggesting she was awake and knew the killer. (Pet. App. 49-51, 111, 142-144; *see* Pet. App. 125-133.) And, based on their questioning of Tuite and what they knew about him from that night – he was loud and agitated; one witness described him as "spinning around in circles" – it seemed unlikely to police that he had committed a stealth murder in a house occupied by six people and a dog. (Pet. App. 10; *see* Pet. App. 134-137, 242.)

While in protective custody, Michael was questioned three times over three days, for a total of about ten hours. Although Escondido police ran the interrogations, they were assisted by a detective from the nearby city of Oceanside and a psychologist. The police initiated this further inquiry because they suspected Michael was not being honest when he claimed in his initial questioning that he awoke at 4:30 a.m. the night of the murder and that Stephanie's door was shut. The evidence suggested she had to have been killed by that time and her body was found lying in the middle of the very doorway Michael claimed was closed. (Pet. App. 12, 49, 112.)

Before his initial questioning, the detectives read Michael his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966) and during the questioning never subjected him to physical harm or threats of physical harm. (Pet. App. 12, 176.) The officers, however, sought to elicit a confession from Michael by telling him they had evidence of his guilt (much of which was false), suggesting he may have committed the crime but had forgotten, and offering psychiatric help rather than prison if he confessed. During the questioning, Michael made statements suggesting that he might have killed Stephanie. On January 23, 1998, Michael was arrested – at which point Shannon was released from protective custody.

During questioning, Michael disclosed he was friends with Aaron Houser, 15, and Joshua Treadway, 14 – whom Michael also had called from the police station. Detectives visited these boys at their homes.

In their visit to Joshua, the police saw a knife in plain view. They sought a search warrant, but before it was executed, Aaron's mother called to report a knife was stolen from Aaron's collection. On January 27, 1998, the police re-interviewed Aaron and, later that day, executed the warrant at Joshua's house. They found two knives under Joshua's bed similar in length (5-1/2 and 6 inches) to the reportedly stolen knife and that used to kill Stephanie, as determined from an examination of her wounds. (Pet. App. 29, 52-53; *see* Pet. App. 11.)

The police read Joshua his *Miranda* rights and then questioned him again. (Pet. App. 94.) In the course of interrogation sessions on January 27 and February 10, 1998, which lasted over twenty total hours and included many of the same techniques that were used with Michael, Joshua confessed to participating in the murder.[5] Joshua said he had served as a lookout while Michael and Aaron killed Stephanie with Aaron's knife, and that Aaron had given him the knife, asking him to hide it. (Pet. App. 58-59, 94.) The police arrested Joshua for his role in Stephanie's death, and based on Joshua's account, re-questioned Aaron.

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[5] The district court understood the seemingly unusual length of Joshua's interrogation as based on his "continu[ing] throughout the questioning to give more and more details regarding the crime, which in turn led to more and [more] questions." (Pet. App. 293.)

Aaron's third, and final, interrogation took place on February 11, 1998 and lasted about nine-and-a-half hours. Although Aaron described in detail how he would have hypothetically killed Stephanie – descriptions the district court considered to be "chilling" and "graphic" (Pet. App. 266) – he maintained his innocence. The police nonetheless arrested Aaron.

2. The criminal proceedings.

Michael, Aaron, and Joshua were charged with Stephanie's murder. Prosecutors used statements from the boys' interrogations in three pre-trial proceedings: (1) an April 1998 "*Dennis H.* Hearing," where their long-term holding as minors had to be approved in accordance with state law; (2) a May 1998 grand jury hearing, where the boys were indicted; and (3) a July 1998 "707 Hearing," where it was determined that the boys would be tried as adults in accordance with state law. (Pet. App. 30-31.) The boys spent months in detention awaiting trial, which was set for January 1999.

On December 17, 1998, the state court held a suppression hearing. The court suppressed almost all of Michael's statements as coerced, all of Joshua's pre-arrest statements as obtained in violation of *Miranda* and some (but not all) of his post-arrest statements as coerced, and all of Aaron's statements as obtained without adequate *Miranda* warnings (but not coerced). (Pet. App. 31-32.) Among Joshua's voluntary and admissible statements was that Aaron

had given him a knife and told him it was used to kill Stephanie. (Pet. App. 52, 58-59, 94.) Among Aaron's statements deemed voluntary, yet inadmissible under *Miranda*, was his description as to how he would have killed Stephanie. (Pet. App. 206-208, 284.)

In any event, the criminal charges against the boys were dropped (without prejudice) shortly before trial, when forensic laboratory testing revealed microscopic drops of Stephanie's blood on a shirt worn the night of her death by Tuite, the transient who was acting suspiciously in the neighborhood. Tuite was later convicted of voluntary manslaughter.

3. The civil suit.

In 1999, the boys and their families filed three separate civil actions, which were consolidated, alleging constitutional violations under 42 U.S.C. § 1983 and state-law torts. Defendants included the cities of Escondido and Oceanside, the Escondido officers that arrested and questioned the boys, and the psychologist and Oceanside detective who assisted. Among plaintiffs' claims were that defendants violated the (1) Fourth Amendment in both arresting the boys and subjecting the Crowe family to their initial search and temporary detention; (2) Fifth Amendment in interrogating the boys; and (3) Fourteenth Amendment in both interrogating the boys and removing them – and Shannon Crowe, temporarily – from their families.

4. The district court's summary judgment orders.

The defendants filed summary judgment motions arguing the police officers were entitled to qualified immunity because (1) the plaintiffs' constitutional rights were not violated, and (2) even if they were, the law was not clear enough to hold a reasonable officer liable for civil damages. *See Pearson v. Callahan*, 129 S.Ct. 808, 818 (2009). In two separate opinions – issued on February 17, 2004 and February 28, 2005 – the district court dismissed most of plaintiffs' claims on summary judgment.

The district court found (1) no Fourth Amendment violation because sufficient evidence supported the boys' arrests; (2) no Fifth Amendment violation because, regardless of any coercion or *Miranda* violation, the boys' statements were used only in pre-trial proceedings and not in a "criminal case" as required by *Chavez*; and (3) no Fourteenth Amendment violation because the police officers' actions did not "shock the conscience."

The district court found in the alternative that even if the police acted unconstitutionally, immunity still attached because it would not have been sufficiently clear that their actions were unconstitutional, as required for liability. On the Fifth Amendment claim, the court described the matter of liability as "*terra incognita*" and noted, "one need only read the numerous and varied opinions in *Chavez* to conclude that the law in this area is not clearly established."

(Pet. App. 166, 273.) Similarly, on the Fourteenth Amendment, the court found the police would not have known they had acted improperly "given that the interrogations lacked the brutality that has previously marked the police conduct found by the courts to be 'shocking to the conscience.'" (Pet. App. 182, 295-296.)[6]

The district court expressly rejected plaintiffs' contention that the interrogations constituted "psychological torture." (Pet. App. 292.) The court viewed all the videotapes in open court and read the transcripts in their entirety, and concluded that the "interrogations, although not commendable," were neither "'egregious', 'outrageous', [nor] 'shocking.'" (Pet. App. 174-175, 292, 293.) The court added that the "[d]efendants never yelled at the boys or even raised their voice[s]," and that "[t]he boys were given food and water and bathroom breaks, even if not always immediately." (Pet. App. 176, 292.)[7]

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[6] As to the Fifth Amendment claim, the court also found the police could not be liable in any event because any harm from the courtroom use of the boys' statements would have been caused by prosecutors, not police.

[7] The district court also granted summary judgment to defendants on the claims against the cities, because of the lack of any city policies supporting the alleged abuses, and on all state-law tort claims. The court, however, refused summary judgment on the Crowes' Fourth Amendment claims based on the treatment of the family, and the Fourteenth Amendment claim for the protective detentions of Michael and Shannon.

5. The Ninth Circuit opinion.

On January 14, 2010, the Ninth Circuit affirmed the district court's orders of summary judgment dismissing Michael and Aaron's Fourth Amendment claims, but reversed the rulings dismissing their Fifth and Fourteenth Amendment interrogation and family companionship claims against the individual defendants.[8] Joshua did not appeal.

The Ninth Circuit held – contrary to the district court and up to four other circuit courts of appeal – that the use of allegedly coerced statements at "a criminal trial" was *not* required for civil liability to attach under the Fifth Amendment. (Pet. App. 40; *see* Pet. App. 39-42.)[9] Ignoring the split of authority on the issue, the court concluded that the use of the allegedly coerced statements at each of the pre-trial proceedings involving Michael and Aaron sufficed. The court relied on the opinion of another Ninth Circuit panel in *Stoot v. City of Everett*, which had expressly detailed its agreement with identical conclusions by the Second and Seventh Circuits and disagreement with contrary decisions from the Third, Fourth, and Fifth Circuits. 582 F.3d 910, 924-25 (9th

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[8] The court of appeals also affirmed the summary judgment orders for the cities on all claims, and because plaintiffs did not appeal the district court orders dismissing their state-law tort claims, those orders stood as well.

[9] The court of appeals also rejected the district court's conclusion that only prosecutors, not police, can cause a violation.

Cir. 2009) (joining with *Higazy v. Templeton*, 505 F.3d 161 (2d Cir. 2007) and *Sornberger v. City of Knoxville, Ill.*, 434 F.3d 1006 (7th Cir. 2006), but splitting from *Renda v. King*, 347 F.3d 550 (3d Cir. 2003); *Burrell v. Virginia*, 395 F.3d 508 (4th Cir. 2005); and *Murray v. Earle*, 405 F.3d 278 (5th Cir. 2005)).[10]

On the interrogation-based Fourteenth Amendment claims, the court of appeals held that for summary judgment purposes the interrogations met the "shocks the conscience" test, and that the police would have known they violated the Constitution. To support that conclusion, the court cited the testimony of a juror from *Tuite's trial*, who called the interrogations – which were introduced there – "psychological torture." (Pet. App. 46-47.) The court also held the familial companionship claims were valid under the Fourteenth Amendment even if the police actions did not "'shock [] the conscience'" because they constituted an "'unwarranted interference'" of such rights by the Fifth Amendment violation alone. (Pet. App. 70 n.23.)

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[10] The Sixth Circuit has also observed that "the thrust of [*Chavez*] rests on the view that the Fifth Amendment is a trial protection." *McKinley v. City of Mansfield*, 404 F.3d 418, 430 n.11 (6th Cir. 2005).

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because this case presents broad, deep, and recurring Circuit splits on important questions of constitutional law resulting chiefly from this Court's six-opinion decision in *Chavez*.

First, up to seven Circuits are split on the type of proceeding that constitutes a "criminal case" for purposes of civil liability under the Fifth Amendment. *See Stoot*, 582 F.3d at 924 (describing "mixed results" in the Circuits on the question). The Second, Seventh, and Ninth Circuits have all held that police can be liable under the Fifth Amendment for § 1983 purposes when they engage in coercive questioning used by prosecutors in pre-trial proceedings relating to criminal prosecution. *See Higazy*, 505 F.3d at 173; *Sornberger*, 434 F.3d at 1026; Pet. App. 44; *Stoot*, 582 F.3d at 925. In contrast, the Third, Fourth, Fifth, and Sixth Circuits consider "criminal case" to be limited to a criminal trial, and thus reject liability for any use of questioning before that point. *See Renda*, 347 F.3d at 559; *Burrell*, 395 F.3d at 514; *Murray*, 405 F.3d at 285; *McKinley*, 404 F.3d at 430 n.11. For example, the Ninth Circuit held here that the use of Michael and Aaron's "statements in the pre-trial proceedings gives rise to a Fifth Amendment cause of action." (Pet. App. 40.) On the other side of the split, the Third Circuit held in *Renda* that it is only through the "use of coerced statements during a criminal trial" that liability can result. 347 F.3d at 559.

In *Chavez*, a majority of this Court was able to agree only that where no charges were filed, no "criminal case" exists from which liability could arise. 538 U.S. at 766-67; *id.* at 778-79 (Souter, J., concurring). The Court thus deferred the question of when a "criminal case" begins. The courts of appeal have undertaken to meet the challenge, but have come up with conflicting definitions, and hence different answers to the ultimate question of (potentially significant) civil liability. Given this deep split among the majority of the Circuits since *Chavez*, it is time for this Court to answer the question it left unanswered there and provide a clear definition of "criminal case" to guide the lower courts. Action by this Court is sorely needed – particularly given the critical balance between diligent police work and civil rights at stake.

Second, guidance is needed on the type of interrogation conduct required to impose liability on police for violating the Fifth Amendment, regardless of whether incriminating statements are used. In *Chavez*, Justice Souter's controlling opinion[11] merely held a failure to give *Miranda* warnings does not

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[11] Because Justice Souter did not join the plurality in rejecting a Fifth Amendment claim based solely on the timing of its use, his concurrence, joined by Justice Breyer, is the holding of the Court. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (in the absence of a majority rationale, the court's holding is that taken by those who concurred on the "'narrowest grounds'" (quoting *Gregg v. George*, 428 U.S. 153, 169 n.15 (1976)).

violate the "core guarantee" of the Fifth Amendment to trigger liability, and that a "charge of outrageous conduct" in questioning "must sound in substantive due process." *Id.* Under this analysis, liability would thus appear limited to conduct that "shocks the conscience" under the Fourteenth Amendment. At least one circuit has suggested that standard applies when allegedly coerced confessions are used at trial. *See Murray*, 405 F.3d at 293 n.52 (using Fourteenth Amendment, not Fifth, to assess interrogation methods). But the Ninth Circuit held here that mere coercion is enough. (*See* Pet. App. 45-48.) This split, though not as deep as the split over the fundamental question of when a "criminal case" begins, nonetheless cries out for this Court to intervene and establish the substantive standards for police questioning under the Fifth Amendment. Guidance is particularly necessary if, as the Ninth Circuit would have it, liability can arise from any use of statements obtained as a result.

Third, this Court should also provide guidance to determine whether interrogations limited to verbal conduct that cause or threaten no physical harm can "shock the conscience" under the Fourteenth Amendment. This Court has described unconstitutional interrogation methods under the Fourteenth Amendment as "brutal" or "too close to the rack and the screw to permit constitutional differentiation." *Rochin v. California*, 342 U.S. 165, 172, 174 (1952). It has not yet addressed whether words alone can suffice. Nevertheless, the Ninth Circuit's "shocks the

conscience" approach here, which permits liability for verbal conduct alone, is out of step with other courts of appeal, encourages excessive judicial oversight, and unduly constrains police investigations. *Compare* Pet. App. 45-48 (words alone suffice), *with Braley v. City of Pontiac*, 906 F.2d 220, 226 (6th Cir. 1990) (doubting "utility" of the "shocks the conscience" test in non-physical injury cases); *and Hopson v. Frederickson*, 961 F.2d 1374, 1378 (8th Cir. 1992) ("[g]enerally, mere verbal threats . . . do not constitute a § 1983 claim").

Finally, in addressing the application of the "shocks the conscience" test to interrogations, review should include correcting the Ninth Circuit's erroneous – and potentially explosive – imposition of personal liability for familial companionship claims even where a police officer's conduct does not "shock the conscience." The Ninth Circuit held in this case that a familial companionship claim arises whenever a relative's constitutional rights are "'interfer[ed]'" with, even if that interference is not conscience-shocking. (Pet. App. 70 n.23.) This holding expands liability to even the most trivial interference with familial relationships and conflicts with existing authority. *See Martinez v. Cui*, 608 F.3d 54, 64 (1st Cir. 2010) ("shocks the conscience" applies to "*all*" Fourteenth Amendment claims).

In sum, petitioners respectfully ask this Court to continue the work it began in *Chavez*, and resolve the unanswered questions that have split the courts of appeal and confused police, prosecutors, and

plaintiffs alike since that splintered decision seven years ago.

I. CERTIORARI SHOULD BE GRANTED TO SETTLE A BROAD AND DEEP CIRCUIT SPLIT ON THE CRITICAL QUESTION LEFT OPEN BY *CHAVEZ* AS TO WHETHER POLICE ARE SUBJECT TO PERSONAL LIABILITY UNDER THE FIFTH AMENDMENT FOR COERCIVE QUESTIONING WHENEVER THE STATEMENTS THEY OBTAIN ARE USED IN COURT.

A. The splintered decision in *Chavez* leaves unanswered the important question of whether police are subject to personal liability for any courtroom use of coercive questioning.

The Fifth Amendment provides that no person shall be "compelled in any criminal case to be a witness against himself," and 42 U.S.C. § 1983 generally provides for a civil action against a public official who deprives a person of that right. This Court concluded in *Chavez* that even though the police repeatedly interrogated a suspect who was not Mirandized and had just been shot in the face, no Fifth Amendment violation arose for § 1983 civil liability purposes where the suspect was never charged with a crime. 538 U.S. at 766-67; *id.* at 778-79 (Souter, J., concurring).

In finding no Fifth Amendment liability in *Chavez*, the four-member plurality, led by Justice

Thomas, relied chiefly on the meaning of "criminal case" under the Amendment, concluding that the phrase "at the very least requires the initiation of legal proceedings." 538 U.S. at 766. In his concurrence, rather than relying on a "courtroom use" distinction, Justice Souter, joined by Justice Breyer, concluded that *Miranda* violations alone do not violate what he described as "the core guarantee" of the Fifth Amendment. *Id.* at 777-78 (Souter, J., concurring).

Chavez left open the question of whether police officers who obtain statements improperly, either through coercion or the lack of *Miranda* warnings, are subject to § 1983 liability under the Fifth Amendment where the statements are used in proceedings for charging or detaining a suspect but not in any proceeding for that suspect's conviction or punishment, such as a trial. The Ninth Circuit has expressly described this situation as "the gray area created by *Chavez*." *Stoot*, 582 F.3d at 923. *Accord Sornberger*, 434 F.3d at 1025 (describing pre-trial use of incriminating statements as the "intermediate question left unanswered by *Chavez*"); *Renda*, 347 F.3d at 559 ("*Chavez* leaves open the issue").

B. The Ninth Circuit has joined with the Second and Seventh Circuits and split from the Third, Fourth, Fifth, and Sixth Circuits in concluding that any courtroom use of an allegedly coerced confession exposes police to liability.

In the present case, the Ninth Circuit held that police officers are subject to § 1983 civil liability under the Fifth Amendment for coercing incriminating statements *whenever* those statements are used in court, even if the plaintiff is released before trial. (*See* Pet. App. 39-40.) Relying on its earlier decision in *Stoot,* the court of appeals read *Chavez* as limiting Fifth Amendment liability only where the challenged interrogations are *never* used. (Pet. App. 36, citing *Stoot*, 582 F.3d at 925-26.) As the panel readily acknowledged in *Stoot*, however, this pre-trial approach, though in accord with decisions of the Second and Seventh Circuits, conflicts with those of several other circuits. 582 F.3d at 924. The panel's decision in the present case only widens the divide.

The Third Circuit held in *Renda*, "it is the use of coerced statements during a criminal trial, and not in obtaining an indictment, that violates the Constitution." 347 F.3d at 559. The court thus rejected a *Miranda*-based claim where the resulting statements were used only to arraign, not convict, the plaintiff.[12]

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[12] The Third Circuit relied on pre-*Chavez* precedent in rejecting liability based upon pre-trial court use. *See Renda*, 347 F.3d at 557 (*citing Giuffre v. Bissell*, 31 F.3d 1241, 1256 (3d Cir.

(Continued on following page)

Similarly, in *Burrell*, the Fourth Circuit rejected a claim arising from a plaintiff's refusal to speak where the plaintiff did not "allege any *trial* action." 395 F.3d at 514 (emphasis in original). And the Fifth Circuit held in *Murray* – a juvenile case, in fact – that "[t]he Fifth Amendment privilege against self-incrimination is a fundamental trial right which can be violated only *at* trial, even though pre-trial conduct by law enforcement officials may ultimately impair that right." 405 F.3d at 285 (emphasis in original). Finally, the Sixth Circuit observed in *McKinley* – albeit in dicta – that "the thrust" of *Chavez* "rests on the view that the Fifth Amendment is a trial protection." 404 F.3d at 430 n.11.

Joining the Ninth Circuit in its reading of *Chavez*, the Second Circuit concluded in *Higazy* that civil liability for a coercive interrogation arose under the Fifth Amendment as soon as the resulting statements of the plaintiff-suspect were used at an initial bail hearing. 505 F.3d at 172. In *Sornberger*, the Seventh Circuit similarly found that liability arose based upon the use of a confession at the plaintiffs' probable cause-bail hearing and arraignment. 434 F.3d at 1026. And, of course, the Ninth Circuit held in both *Stoot* and this case that any pre-trial courtroom use subjects police to liability. (*See* Pet. App. 39, citing *Stoot*, 582 F.3d at 925-26.)

1994)). But this was proper given that *Chavez* involved no use at all, thus leaving this precedent untouched.

C. Given the broad and deep Circuit split on the question, clear and consistent guidance on police liability for the pre-trial use of allegedly coercive interrogations is sorely needed by police, prosecutors, and plaintiffs alike.

The Circuit split on whether any pre-trial courtroom use of a coerced statement results in a Fifth Amendment violation for § 1983 purposes is of particular concern because it involves an area of law where predictable and reliable rules are critical. Lacking uniform and concrete guidance on this question, police, prosecutors, and plaintiffs are subjected to different results depending on where an investigation takes place. The resulting uncertainty and seemingly arbitrary results infect the entire investigative process, where public safety and civil rights are balanced on a daily basis.

The rule most consistent with the language and purpose of the Fifth Amendment – at least for purposes of civil liability[13] – is that a violation occurs only at a criminal trial, where both the opportunity to testify and resulting criminal penalties are realized, or not. *See Kastigar v. United States*, 406 U.S. 441,

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[13] As the Ninth Circuit has described the holding in *Chavez*, "[c]ritical to the reasoning of all six justices was the simple principle that the scope of the Fifth Amendment's efficacy is narrower when used as a sword in a civil suit than when used as a shield against criminal prosecution." *United States v. Antelope*, 395 F.3d 1128, 1141 (9th Cir. 2005).

453 (1972) ("sole concern" of the Fifth Amendment is "testimony leading to the infliction of penalties . . . affixed to criminal acts" (internal quotation marks omitted)). Among other sources, the circuits taking this approach have cited this Court's many references to the Amendment as a "trial right." *See, e.g.*, *Withrow v. Williams*, 507 U.S. 680, 692 (1993); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990). And although circuits going the other way have also cited decisions from this Court, those cases typically concerned non-trial uses of the Fifth Amendment privilege, not civil liability. *See, e.g.*, *Michigan v. Tucker*, 417 U.S. 433, 440 (1974); *Lefkowitz v. Turley*, 414 U.S. 70, 84 (1973).

The Ninth Circuit's rule here – particularly in denying even qualified immunity to the officer – goes too far in imposing broad liability on police. In *Chavez*, Justice Souter's controlling opinion rejected the imposition of civil liability for statements obtained in violation of *Miranda* where no charges were filed. Justice Souter stressed that to hold otherwise would recognize no "limiting principle" or "stopping place" to suit whenever an involuntary statement is obtained or penalty threatened. 538 U.S. at 778-79 (Souter, J., concurring). The Ninth Circuit's test in the present case, which imposes liability for *any* pretrial use, may offer a theoretical "stopping place," but its open-ended nature is not terribly different from that proposed by the plaintiff in *Chavez* and rejected by this Court. Under the Ninth Circuit's test, personal liability is imposed even where, as here, it is

undisputed that the police incurred no liability for the *arrests* – and thus acted appropriately in initiating criminal prosecution – independent of any coercion.[14]

Wherever the line should be drawn, however, the fact that the courts of appeal have repeatedly and continually failed to draw it with any clarity or consistency has immediate and serious consequences for all concerned.

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[14] The Ninth Circuit's test also ignores key aspects of the pre-trial "uses" in this case that caution against liability. In California, for example, a grand jury is part of "*the charging process*," not "*the adjudicative process*." *Cummiskey v. Superior Court*, 3 Cal. 4th 1018, 1026, 839 P.2d 1059, 1064 (1992). Similarly, neither a "*Dennis H.*" nor a "707" hearing is a "criminal proceeding" under state law. Cal. Welf. & Inst. Code §§ 203, 630 (West 2008) (defining "*Dennis H.*" hearing, where a minor's pre-trial detention is reviewed, as *not* a "criminal proceeding"); *Barker v. Estelle*, 913 F.2d 1433, 1442 (9th Cir. 1990) (noting that the purpose of a "707 hearing," where a trial forum is chosen, is not for "criminal proceedings against the juvenile, but to determine whether it would be proper for the juvenile court to continue to assert jurisdiction" (internal quotation marks omitted)).

II. CERTIORARI SHOULD BE GRANTED TO GIVE NEEDED GUIDANCE TO POLICE AND THE PUBLIC ON WHAT TYPE OF ACTIVITY CAUSES POLICE TO BE EXPOSED TO CIVIL LIABILITY UNDER THE FIFTH AMENDMENT.

A. After *Chavez*, the courts of appeal are split on whether police are subject to civil liability under the Fifth Amendment by engaging in mere coercion or a violation of *Miranda*, or whether their acts must otherwise "shock the conscience."

In rejecting the Fifth Amendment claim in *Chavez*, the four-member plurality made it clear that:

> Our views on the proper scope of the Fifth Amendment's Self-Incrimination Clause do not mean that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used at trial; it simply means that the Fourteenth Amendment's Due Process Clause, rather than the Fifth Amendment's Self-Incrimination Clause, would govern the inquiry. . . .

538 U.S. at 773. And, in his concurring (and controlling) opinion, Justice Souter concluded that an isolated *Miranda* violation does not violate the "core guarantee" of the Fifth Amendment in a manner sufficient to impose civil liability. *Id.* at 779 (Souter, J., concurring). Rather, if any claim of "outrageous conduct by the police" was to be recognized based on

the aggressive interrogation there, it would be analyzed not under the Fifth Amendment, but rather as a violation of substantive due process under the Fourteenth Amendment. *Id.* The determinative question is therefore not merely whether or when coerced statements are used but instead whether the underlying conduct "shocks the conscience." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (describing Fourteenth Amendment test).[15]

Despite the observations of the majority of this Court in *Chavez*, the courts of appeals have split on what type of police conduct is required to impose liability under the Fifth Amendment – particularly, whether mere coercion or a *Miranda* violation is enough, or whether conscience-shocking acts are required. For example, the Fifth Circuit in *Murray* treated § 1983 coerced-confession claims, regardless of any use issue, as arising under the Fourteenth Amendment – i.e., "shocks the conscience." 405 F.3d at 290 nn.39-40. Similarly, the Third Circuit in *Renda* denied a claim under the Fifth Amendment based solely on the use issue and never even considered the "nature" of the questioning, therefore suggesting only

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[15] In his dissent in *Chavez*, Justice Kennedy described both the plurality and concurring opinions as maintaining "that in *all instances* a violation of the [Fifth Amendment] simply does not occur unless and until a statement is introduced at trial, no matter how severe the pain or how direct and commanding the official compulsion used to extract it." 538 U.S. at 790 (Kennedy, J., dissenting) (emphasis added).

the Fourteenth Amendment addresses such matters. 347 F.3d at 552 n.2.

In the present case, however, the Ninth Circuit concluded that the statements allegedly coerced from Michael and Aaron can result in § 1983 liability under the Fifth Amendment, regardless of whether the actions of the police otherwise "shock the conscience" for purposes of Fourteenth Amendment substantive due process. (*See* Pet. App. 39-45.) Likewise, in *Higazy*, the Second Circuit held that a coerced confession gave rise to civil liability under the Fifth Amendment, without any further inquiry as to the nature of the coercion. 505 F.3d at 171-73.

It thus remains unclear what standard should be used to assess the nature of police interrogations for purposes of § 1983 liability under the Fifth Amendment. This lack of clarity is a particular problem where, as here, claims for civil damages are invariably made under the broad banner of "coercion."

B. Given the necessary balance between effective police work and the protection of civil rights, guidance is needed on the type of activity required for police officers to be subject to civil liability under the Fifth Amendment.

The qualified-immunity doctrine protects police officers from being sued in the performance of their duties. It is a broad doctrine that applies either (a) where no violation of a constitutional right occurs, or

(b) where a violation occurs, but the nature of the right is not sufficiently clear that a reasonable police officer would understand his actions would constitute a violation. *See Pearson*, 129 S.Ct. at 818. Because the doctrine protects officers not only from liability, but from being sued at all, it is particularly amenable to resolution on summary judgment. *See id.* at 815 (stressing that the "'driving force'" behind immunity is resolving invalid claims "'at the earliest possible stage in litigation'" (citations omitted)).

The purpose of the qualified-immunity doctrine is to protect the exercise of professional judgment in service of the public good – here, public safety and crime-solving – without distraction or fear of suit. *Mitchell v. Forsyth*, 472 U.S. 511, 525-26 (1985). This Court recently described the doctrine as balancing two important interests: "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, 129 S.Ct. at 815.

Wherever the balance is drawn, clarity is critical. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001) (discussing "essential interest" of police in "readily administrable rules"); *Arizona v. Roberson*, 486 U.S. 675, 681-82 (1988) (on the benefit of "clear and unequivocal" guidelines for Fifth Amendment protections (quotation marks omitted)). Without clear rules that are easy to apply, police officers may be unduly hampered "in the real world of investigation

and interrogation." *Davis v. United States*, 512 U.S. 452, 461 (1994).

By imposing civil liability under the Fifth Amendment for mere coercive questioning, rather than acts that "shock the conscience," the Ninth Circuit's holding limits the exercise of proper discretion by police in their investigatory activities. Under the Ninth Circuit's analysis, police officers would understandably fear that anything they do in the course of an interrogation may later be interpreted as coercive and yield liability. And summary judgment would almost never be available for such claims because all that a plaintiff must allege is that statements were coerced. This is not a particularly high threshold where, as is often the case, the plaintiff has already been released and can even draw on the results of a suppression hearing.

Moreover, in imposing liability for mere coercion, the Ninth Circuit, like the Second Circuit in *Higazy*, ignored the suggestion by the majority in *Chavez* and the holdings of other circuits that "shocks the conscience" is the proper test for liability. Worse yet, the Ninth Circuit determined that police should have been aware of this broad potential for liability, and thus lose their qualified immunity – notwithstanding *Chavez* and its progeny. As this Court observed in *Wilson v. Lane*, "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." 526 U.S. 603, 618 (1999).

III. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER, AS THE NINTH CIRCUIT HELD HERE, VERBAL CONDUCT ALONE CAN "SHOCK THE CONSCIENCE" FOR PURPOSES OF FOURTEENTH AMENDMENT LIABILITY.

A. The Ninth Circuit's decision, which found non-tortious verbal questioning alone can "shock the conscience," conflicts with decisions of this Court and other circuits.

The Ninth Circuit concluded that Michael and Aaron's interrogations can meet the "shocks the conscience" test based solely upon the verbal conduct of the defendant police and without any analysis or consideration of the officers' purpose or intent. (*See* Pet. App. 45-48.) Because the interrogations at issue here involved no physical harm, threats of physical harm, or any other tortious action, and were devoid of any evidence of an intent to deprive – or even deliberately disregard – constitutional rights, the Ninth Circuit's decision conflicts with decisions by this Court and those of other circuits.

This Court adopted the "shocks the conscience" test to analyze police misconduct under the Fourteenth Amendment in *Rochin*. 342 U.S. 165. There, the police engaged in forced "stomach pumping" to extract evidence of illegal narcotics. *Id.* at 166. This Court concluded that such methods of obtaining evidence violate the Fourteenth Amendment's due process clause because they "shock[ ] the conscience,"

and are "too close to the rack and the screw to permit constitutional differentiation." *Id.* at 172.

Despite its finding that the "shocks the conscience" test was met in *Rochin*, this Court has warned against the overuse of substantive due process in police misconduct cases, particularly where it would serve as a mere alternative to tort law. *See Lewis*, 523 U.S. at 848-49 ("We have . . . rejected the lowest common denominator of customary tort liability as any mark of sufficiently shocking conduct"); *Paul v. Davis*, 424 U.S. 693, 701 (1976) (substantive due process is not a "font of tort law"). Thus, "only the most egregious official conduct" suffices. *Lewis*, 523 U.S. at 846. This Court held in *Lewis*, for example, that a claim for "reckless disregard for life" arising from a high-speed chase resulting in a fatality, even if true, was not actionable. *Id.* at 854. And in *Chavez*, at least three justices found the questioning of a suspect seeking treatment for gunshot wounds not to meet the "shocks the conscience" test, with the majority agreeing only to remand. 538 U.S. at 774-76; *id.* at 779-80 (Souter, J. concurring).

Numerous circuits have refused to find conscience-shocking behavior in interrogations limited to words. In *Tinker v. Beasely*, for example, the Eleventh Circuit found an otherwise coercive interrogation did not "shock the conscience" where the police were solving a murder in which other evidence implicated the plaintiff and the allegedly improper acts consisted of lying and overzealous questioning on repeated occasions over three days. 429 F.3d 1324, 1329 (11th

Cir. 2005). In *Robertson v. Plano City of Texas*, the Fifth Circuit found false warnings of adult prison time to a juvenile, causing his suicide, did not "shock the conscience," particularly where the juvenile was the focus of the relevant criminal inquiry. 70 F.3d 21, 25 (5th Cir. 1995). And in *Pittsley v. Warish*, the First Circuit found verbal threats by police to two small children were insufficient. 927 F.2d 3, 7 (1st Cir. 1991), *abrogated on other grounds by Martinez*, 608 F.3d 54.

The Sixth Circuit observed in *Braley*, "[a]pplying the 'shocks the conscience' test in an area other than excessive force . . . is problematic." 906 F.2d at 226. The court continued, "[w]e doubt the utility of such a standard outside the realm of physical abuse, an area in which the consciences of judges are shocked with some degree of uniformity." *Id.*

Perhaps threats of death, or severe physical harm, may suffice, but courts of appeal have consistently refused to consider anything less to be conscience-shocking. *Compare Burton v. Livingston*, 791 F.2d 97, 99-101 (8th Cir. 1986) (finding due process violation where prison guard "terrorized" prisoner with cocked gun and death threats), *with Hopson*, 961 F.2d at 1378-79 (finding no excessive force where a police officer uttered a racial epithet and then threatened to knock the plaintiff's teeth out during questioning). In general, mere verbal threats made by a police officer do not constitute a § 1983 claim. *Hopson*, 961 F.2d at 1378.

Where the "shocks the conscience" test has been applied, courts have also generally required an intent to cause suffering, or at least a deliberate disregard for a great risk of harm, unjustified by a governmental interest. *See, e.g., Draw v. City of Lincoln Park*, 491 F.3d 550, 555 (6th Cir. 2007) (describing *Lewis* as requiring purpose to cause harm); *Sanford v. Stiles*, 456 F.3d 298, 305, 310 (3d Cir. 2006) (using sliding scale, but requiring at least deliberate indifference to severe harm); *Bublitz v. Cottey*, 327 F.3d 485, 491 (7th Cir. 2003) ("generally only *deliberate* action intended to harm" is actionable). And, with regard to claims of mental suffering from interrogations, the threshold is particularly high; namely, a plaintiff must show action "calculated to induce not merely momentary fear or anxiety, but severe mental suffering." *Wilkins v. May*, 872 F.2d 190, 195 (7th Cir. 1989). Mere coercion is not enough. *See Tinker*, 429 F.3d at 1328 (distinguishing coerced-confession and conscience-shocking inquiries).

This Court acknowledged in *Lewis* that the "shocks the conscience" test is inexact. 523 U.S. at 847 (describing "shocks the conscience" as "no calibrated yard stick"). Yet here, the Ninth Circuit stripped qualified immunity from police who caused or threatened no physical harm, used valid interrogation techniques, and had reasonable cause to both arrest and question plaintiffs.[16] It is unfair for police

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[16] The techniques used by the officers in this case, including alleged lies about evidence and promises of help, were not even

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to bear the costs of guessing wrong, particularly where the district court, after viewing all the video footage of the interrogations – over forty hours in total – and reading all the transcripts in their entirety, expressly found the interrogations *not* to shock the conscience. *See Wilson*, 526 U.S. at 618.

B. The Ninth Circuit's opinion, which does not require familial companionship claims under the Fourteenth Amendment to meet the "shocks the conscience" test, conflicts with existing authority and should be reviewed.

In its opinion, the Ninth Circuit reversed the district court's orders of summary judgment in favor of defendants on the Crowe and Houser family claims for loss of companionship in connection with the interrogations and detentions of Michael and Aaron. In so doing, the Ninth Circuit held that "[t]he standard for deprivation of familial companionship is 'unwarranted interference,' not conduct which 'shocks the conscience.'" (Pet. App. 70 n.23.) Some courts may still use the phrase "unwarranted interference" to describe substantive due process in this context, but after *Lewis*, "shocks the conscience" is the singular

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coercive, much less conscience-shocking. *See Frazier v. Cupp*, 394 U.S. 731, 737-39 (1969) (false evidence claim did not make confession involuntary); *Cunningham v. City of Wenatchee*, 345 F.3d 802, 810 (9th Cir. 2003) (suggesting that "cooperation could lead to treatment rather than prison" is not coercive).

standard for liability. The Ninth Circuit's holding to the contrary should be reviewed.

This Court held in *Lewis* that "in a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." 523 U.S. at 847 n.8. As the First Circuit recently observed, "*Lewis* clarified that the shocks-the-conscience test . . . governs *all* substantive due process claims based on executive, as opposed to legislative, action." *Martinez*, 608 F.3d at 64 (emphasis in original). In accord with *Lewis*, courts of appeal have routinely applied the "shocks the conscience" test to familial companionship claims under the Fourteenth Amendment. *See, e.g., Eidson v. Tenn. Dep't of Children's Servs.*, 510 F.3d 631, 635-36 (6th Cir. 2007); *Aguilar v. U.S. Immigration & Customs Enforcement Div. of the Dep't of Homeland Sec.*, 510 F.3d 1, 21-22 (1st Cir. 2007); *Anthony v. N.Y.C.*, 339 F.3d 129, 142-43 (2d Cir. 2003); *Miller v. City of Phila.*, 174 F.3d 368, 374-76 (3d Cir. 1999).

Because the Ninth Circuit's decision conflicts with *Lewis* and its application by other courts of appeal to the common matter of investigative liability wherever a family member is involved, review is necessary.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully submit that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HORVITZ & LEVY LLP
JASON R. LITT
JAMES A. SONNE
Counsel of Record
15760 Ventura Boulevard, 18th Floor
Encino, California 91436-3000
(818) 995-0800
FAX: (818) 995-3157
jsonne@horvitzlevy.com

DALEY & HEFT LLP
RICHARD J. SCHNEIDER
GOLNAR J. FOZI
462 Stevens Avenue
Suite 201
Solana Beach, California
92075-2065
(858) 755-5666
FAX: (858) 755-7870

OFFICE OF THE CITY ATTORNEY
JEFFREY R. EPP
MICHAEL R. MCGUINNESS
OFFICE OF THE CITY ATTORNEY
201 North Broadway
Escondido, California 92025
(760) 839-4608
FAX: (760) 741-7541

Counsel for Petitioners

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL CROWE; STEPHEN CROWE; CHERYL A. CROWE; JUDITH ANN KENNEDY; SHANNON CROWE, a minor, through guardian ad litem STEPHAN CROWE; ZACHARY TREADWAY; JOSHUA DAVID TREADWAY; MICHAEL LEE TREADWAY; TAMMY TREADWAY; JANET HASKELL; MARGARET SUSAN HOUSER; CHRISTINE HUFF; GREGG HOUSER; AARON HOUSER,
Plaintiffs-Appellees,

v.

COUNTY OF SAN DIEGO; THE CITY OF OCEANSIDE; CHRIS MCDONOUGH; GARY HOOVER; SUMMER STEPHAN; LAWRENCE BLUM; CITY OF ESCONDIDO; NATIONAL INSTITUTE FOR TRUTH VERIFICATION; RICK BASS,
Defendants,

and

MARK WRISLEY; BARRY SWEENEY; RALPH CLAYTOR; PHIL ANDERSON,
Defendants-Appellants.

No. 05-55467

D.C. No.
CV-99-00241-JSR

MICHAEL CROWE; STEPHEN CROWE; CHERYL A. CROWE,
Plaintiffs-Appellants,

SHANNON CROWE, a minor, through guardian ad litem, STEPHAN CROWE,
Plaintiff-Appellant,

and

JUDITH ANN KENNEDY,
Plaintiff,

ZACHARY TREADWAY; JOSHUA DAVID TREADWAY; MICHAEL LEE TREADWAY; TAMMY TREADWAY; JANET HASKELL; MARGARET SUSAN HOUSER; CHRISTINE HUFF; GREGG HOUSER; AARON HOUSER,
Plaintiffs,

v.

COUNTY OF SAN DIEGO; THE CITY OF OCEANSIDE; CHRIS MCDONOUGH; GARY HOOVER; SUMMER STEPHAN; LAWRENCE BLUM; CITY OF ESCONDIDO; NATIONAL INSTITUTE FOR TRUTH VERIFICATION; RICK BASS,
Defendants,

and

MARK WRISLEY; BARRY SWEENEY; RALPH CLAYTOR; PHIL ANDERSON,
Defendants-Appellees.

No. 05-55542

D.C. No. CV-99-00241-JSR

STEPHEN CROWE; CHERYL CROWE; JUDITH ANN KENNEDY; SHANNON CROWE, a minor through their guardian ad litem, STEPHEN CROWE; ZACHARY TREADWAY; JOSHUA DAVID TREADWAY; MICHAEL LEE TREADWAY; TAMMY TREADWAY; JANET HASKELL,

Plaintiffs,

CHRISTINE HUFF,

Plaintiff,

and

MARGARET SUSAN HOUSER; GREGG HOUSER; AARON HOUSER,

Plaintiffs-Appellants,

v.

COUNTY OF SAN DIEGO; MARK WRISLEY; BARRY SWEENEY; RALPH CLAYTOR; CITY OF ESCONDIDO; PHILLIP ANDERSON; SUMMER STEPHAN; RICK BASS, Lieutenant,

Defendants-Appellees.

No. 05-56311

D.C. No. CV-99-00241-JSR

MICHAEL CROWE; STEPHEN CROWE; CHERYL A. CROWE; JUDITH ANN KENNEDY; SHANNON CROWE, a minor, through guardian ad litem STEPHEN CROWE,
Plaintiffs-Appellants,

and

ZACHARY TREADWAY; JOSHUA DAVID TREADWAY; MICHAEL LEE TREADWAY; TAMMY TREADWAY; JANET HASKELL; MARGARET SUSAN HOUSER; CHRISTINE HUFF; GREGG HOUSER; AARON HOUSER,
Plaintiffs,

v.

COUNTY OF SAN DIEGO; THE CITY OF OCEANSIDE; CHRIS MCDONOUGH; GARY HOOVER; SUMMER STEPHAN; LAWRENCE BLUM; CITY OF ESCONDIDO; NATIONAL INSTITUTE FOR TRUTH VERIFICATION; RICK BASS; MARK WRISLEY; BARRY SWEENEY; RALPH CLAYTOR; PHIL ANDERSON,
Defendants-Appellees.

No. 05-56364

D.C. No. CV-99-00241-JSR

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Southern District of California
John S. Rhoades, District Judge, Presiding

Argued and Submitted
June 1, 2008 – Pasadena, California
Filed January 14, 2010
Amended January 27, 2010
Second Amendment June 18, 2010

Before: Stephen S. Trott, Sidney R. Thomas, and Raymond C. Fisher, Circuit Judges.

Opinion by Judge Thomas

COUNSEL

Milton J. Silverman (argued), Robert T. Geile, Law Office of Milton J. Silverman; attorneys for plaintiffs-appellants and Cross-Appellees Michael Crowe, Stephen Crowe, Cheryl Crowe, and Shannon Crowe.

Jon R. Williams (argued), Lindsay J. Reese, Ross, Dixon & Bell; Dennis A. Schoville, Louis G. Arnell, James S. Iagmin, Schoville & Arnell; attorneys for plaintiffs-appellants and cross-appellees Aaron Houser, Margaret Susan Houser, and Gregg Houser.

John J. Sansone, County Counsel, County of San Diego, George W. Brewster Jr. (argued), Senior Deputy; attorneys for defendant-appellant Summer Stephan.

Richard J. Schneider, Glnar J. Fozi, Daley & Heft; Steven J. Renick (argued), Manning & Marder, Kass Ellrod, Ramirez; attorneys for defendants-appellees and Cross-Appellants City of Escondido, Mark Wrisley, Barry Sweeney, Ralph Claytor, and Phil Anderson.

Diana L. Field, Ferguson, Praet & Sherman; Timothy T. Coates, Cynthia T. Tobisman, Greines, Martin, Stein & Richland; attorneys for defendants-appellees and cross-appellants City of Oceanside, Oceanside Police Department, and Christopher McDonough.

Kenneth H. Moreno, Scott J. Loeding, Murchinson & Cumming; attorneys for defendant-appellee Lawrence N. Blum, Ph.D.

ORDER

The panel has voted to amend the opinion filed in this case. With the amendments, the panel has voted to deny the petitions for rehearing. Judge Thomas and Judge Fisher have voted to deny the petitions for rehearing en banc, and Judge Trott so recommends.

The full court has been advised of the petitions for rehearing en banc, and no judge of the court has requested a vote on the petitions for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for panel rehearing and rehearing en banc are denied. No further petitions for rehearing will be entertained.

The opinion filed on January 27, 2010 is hereby amended as follows:

1. The second full sentence, beginning on line 3 and continuing to line 4, at the top of Slip Op. page 1576 is deleted.

2. The first full sentence, beginning on line 2 at the top of Slip Op. page 1579 is deleted, and the following inserted in lieu thereof:

> The following defendants are parties to this appeal: the City of Escondido and Escondido Police Detectives Mark WRISLEY, Phil Anderson, Barry Sweeney, and Ralph CLAYTOR (collectively "the Escondido defendants"); the City of Oceanside and Oceanside Police Detective Chris McDonough (collectively "the Oceanside defendants"); Dr. Lawrence Blum; and Assistant District Attorney Summer Stephan.

3. The last sentence at the bottom of Slip Op. page 1610 is deleted, and the following inserted in lieu thereof:

> The district court's grant of summary judgment in favor of McDonough is affirmed as to the Fourth Amendment conspiracy claims.

4. The paragraph beginning at the bottom of Slip Op. page 1619 and continuing onto page 1620 is deleted and the following inserted in lieu thereof:

> We reverse the district court's grant of summary judgment as to: (1) Michael and Aaron's Fifth Amendment claims; (2) Michael and Aaron's Fourteenth Amendment substantive due process claims; (3) all otherwise surviving claims against McDonough; (4) all otherwise surviving claims against Blum; (5) the Crowes' deprivation of familial companionship claim based on Michael's detention;

and (6) the Housers' deprivation of familial companionship claim based on Aaron's detention. We affirm the district court's grant of summary judgment as to: (1) Aaron's Fourth Amendment claim that police lacked probable cause to arrest him; (2) Michael's Fourth Amendment claim that police lacked probable cause to arrest him; (3) Michael's claim that police violated his Fourth Amendment rights by strip searching him; (4) Aaron's Fourth Amendment claim that the warrants authorizing the search of his home were not supported by sufficient probable cause; (5) the conspiracy claims against McDonough; (6) Michael and Aaron's defamation claims against Stephan; (7) Aaron's defamation claim against Blum; and (8) all claims against the Cities of Escondido and Oceanside. Additionally, we affirm the district court's denial of summary judgment as to: (1) Cheryl, Stephen, and Shannon Crowes' claims that police violated his Fourth Amendment rights by strip searching them; (2) Cheryl and Stephen's Fourth Amendment claims that the warrant authorizing police to draw blood samples was not supported by probable cause; (3) Cheryl and Stephen's Fourth Amendment claims of wrongful detention; and (4) the Crowes' deprivation of familial companionship claims based on the placement of Michael and Shannon in protective custody. We remand to the district court for further proceedings consistent with this opinion.

Each party shall bear their own costs on appeal.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

OPINION

THOMAS, Circuit Judge:

This civil rights case arose from the investigation and prosecution of innocent teenagers for a crime they did not commit. Michael Crowe, Aaron Houser, and Joshua Treadway were wrongfully accused of the murder of Michael's 12-year-old sister Stephanie Crowe. After hours of grueling, psychologically abusive interrogation – during which the boys were isolated from their families and had no access to lawyers – the boys were indicted on murder charges and pre-trial proceedings commenced.

A year later, DNA testing revealed Stephanie's blood on the shirt of a transient, Richard Tuite, who had been seen in the Crowes' neighborhood on the night of the murder and reported by several neighbors for strange and harassing behavior. The shirt had been collected as part of the initial investigation, but never fully tested. Charges against the boys were eventually dropped, and Tuite was convicted of Stephanie's murder.

Michael, Aaron, Joshua, and their families filed a complaint against multiple individuals and government entities who had been involved in the investigation and prosecution of the boys. The complaint

alleged, amongst other claims, constitutional violations under the Fourth, Fifth, and Fourteenth Amendments, and defamation claims. In two separate orders, the district court granted summary judgment in favor of the defendants as to the majority of the plaintiffs' claims. The Crowes and the Housers now appeal the bulk of those orders and several defendants cross-appeal the district court's denial of summary judgment on qualified immunity grounds as to several claims. We affirm in part and reverse in part.

I. Facts and Procedural History

A. *The Crime and Initial Investigation*

On the night of January 20, 1998, police received several 911 phone calls reporting that a man – later identified as Richard Tuite – was bothering people in the neighborhood in which the Crowe family resided. Witnesses testified that Tuite appeared drunk or high. One witness heard him yell "I'm going to kill you you fucking bitch." Another witness saw him spinning around in circles. Between 7:00 p.m. and 8:00 p.m., Tuite entered one house in the neighborhood after the occupant, Dannette Mogelinski, mistook his knock for that of a neighbor. Tuite repeatedly asked for Tracy. Mogelinski said she did not know Tracy. Tuite left, but then opened the door and again asked for Tracy. Mogelinski again said she did not know Tracy, and Tuite left. Around 7:50 p.m. Shannon Homa called 911 to report a man behaving strangely in an area near the Crowes' home. At approximately

9:28 p.m., Gary West, a neighbor of the Crowes, called 911 to report a transient who had knocked on his door and said he was looking for a girl.

Escondido police officer Scott Walters was dispatched to the area. As Officer Walters drove toward the Crowe house, he noticed a door next to the garage close. He could not see who closed the door. Officer Walters then noted in his log that the transient was "gone on arrival" and left the scene at 9:56 p.m.

Sometime between 10:00 p.m. and 11:00 p.m., 12-year-old Stephanie Crowe was stabbed to death in her bedroom. An autopsy determined that Stephanie was stabbed numerous times with a knife with a 5-6 inch blade.

Stephanie was found dead by her grandmother the next morning around 6:30 a.m. Paramedics were the first to respond to the 911 call. Defendant Escondido Police Department Detective Barry Sweeney arrived on the scene shortly thereafter. Police checked all of the doors and windows in the house and found no signs of forced entry. However, they did discover that a door leading to the master bedroom, a door located near the garage,[1] and at least one window had not been locked during the night.

Police questioned all of the members of the Crowe household at the Escondido police station in

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[1] This was the same door Officer Walters saw close the night before.

the afternoon of January 21, including Stephanie's parents, Stephen and Cheryl Crowe; Stephanie's grandmother, Judith Kennedy; Stephanie's 10-year-old sister, Shannon Crowe; and Stephanie's 14-year-old brother, Michael Crowe. The police also strip searched Michael, Stephen, Cheryl, and Shannon and photographed them nude or partially nude.[2]

Before questioning Michael, the police advised him of his *Miranda* rights. The police did not Mirandize other members of the Crowe family. Michael was interviewed by Detective Mark Wrisley, a defendant in this case. Michael told Detective Wrisley that he had gotten up at 4:30 a.m. that morning with a headache, and that he had been running a fever the day before. He described having turned on his television for light and walked to the kitchen, where he took some Tylenol. He also told Detective Wrisley that all other bedroom doors had been shut when he was in the hallway. The defendant officers testified that they considered Michael's statement that the bedroom doors were closed suspicious because by 4:30 a.m. Stephanie was dead in the doorway of her bedroom with the door open.

After police had questioned all members of the Crowe family, they decided to place Michael and

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[2] Michael was photographed in only his underwear. Stephen was photographed completely nude. Cheryl was photographed without her underwear. Shannon was photographed without a bra.

Shannon in protective custody and transported them to the Polinksy Children's Center.[3]

The same day, the police located Richard Tuite and brought him to the police station so that they could talk to him, fingerprint him, and take samples of fingernail scrapings, hair, and clothing. At the police station, Detective Sweeney attempted to interview Tuite, but did not obtain much information. Detective Sweeney did not run a background check on Tuite. A background check would have shown that Tuite had an extensive mental health history and had been arrested multiple times on various charges. Tuite was detained for only a short period of time and then released.

B. *The Interrogations and Related Searches*

1. Michael

Michael was interrogated on four occasions, starting with the initial interview on January 21, 1998, at the Escondio police station. On January 22, 1998, Michael was interviewed a second time, by Detectives Wrisley and Han,[4] at the Polinksy Children's Center, where he and Shannon had spent the

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[3] The Polinksy Children's Center is a 24-hour facility for the temporary emergency shelter of children who must be separated from their families for their own safety, or when parents can not provide care.

[4] Detective Han was not named as a defendant in this action.

night after being taken into protective custody. During this interview, Michael again stated that he had woken up around 4:30 a.m., had gone to the kitchen for some Tylenol, and had thought the other doors in the hallway were closed. Michael next described waking the next morning to his parents' screams and then seeing Stephanie soaked in blood. When asked how he felt when he saw her, Michael said he cried. He described his sister as "the best person" and "kind" and expressed anger at whoever had killed her.

That same day the Escondido Police Department contacted the Oceanside Police Department to request the assistance of an officer who knew how to operate a "computer voice stress analyzer." Oceanside responded by sending one of its detectives, Christopher McDonough. When Detective McDonough arrived at Escondido, he was provided with limited information regarding Stephanie's murder.

Michael was then interviewed later that day for a third time, by Detectives McDonough and Claytor. This interview lasted more than three hours and took place at the Escondido Police Station. At the beginning of the interview, Michael indicated that he felt sick. Michael then repeated the same series of events for the evening of January 20 and the morning of January 21 that he had recounted in the first two interviews. Detective Claytor then asked Michael if he would be willing to take "a truth verification exam." Michael responded that he would be willing, but added:

> I feel like I just . . . I spent all day away from my family. I couldn't see them. . . . I feel like I'm being treated like I killed my sister, and I didn't. It feels horrible, like I'm being blamed for it. Everything I own is gone . . . Everything I have is gone. Everything. You won't even let me see my parents. It's horrible.

Detective McDonough then entered the room and took over the interview.

After Michael recounted the same series of events and again expressed how stressful the past two days had been, McDonough introduced the computer stress voice analyzer. McDonough told Michael the stress voice analyzer "was controlled by the government for a long time, okay, because it was so accurate."

Detective McDonough asked Michael a long series of "yes or no" questions, including both control questions and questions specific to Stephanie's death. McDonough then reviewed the results with Michael and told him that the test "showed that you had some deception on some of the questions." McDonough asked him, "Is there something, though, that maybe you're blocking out . . . in your subconscious mind that we need to be aware of?" McDonough pressured Michael about whether there was something Michael needed to confess, which Michael repeatedly denied.

At this point Detective Claytor took over the interview. Claytor told Michael they found blood in his room, lifted fingerprints off the blood stains, and

that the police now knew who killed Stephanie. Then he told Michael:

> We can't bring her back. I'll tell you what we can do. What we can do is the right thing by Stephanie's name and by yourself and by your parents. Okay. Now, there is a couple of things that we need your help with . . . that only you're going to be able to help us with. . . . What I'd like you to do right off the bat, rather than put our team through any more, can you tell me what you did with the knife?

Michael responded: "What – God. I don't – no. I don't know. I didn't do it. I swear to God." Claytor continued to insist Michael killed Stephanie and Michael continued to deny it. Claytor also repeatedly told Michael that he wasn't a bad person and that they wanted to help him.

Claytor next introduced the idea that Michael killed Stephanie but did not remember it. Michael started repeating over and over that he didn't remember doing anything. He also asked Claytor if he was sure Michael had done it, to which Claytor responded, "I'm sure about the evidence. Absolutely." At this point Claytor left and McDonough resumed the interview. As Claytor left Michael sobbed, "God. God. Why? Why? Why? Oh, God. God. Why? Why? I don't deserve life. I don't want to live. I can't believe this. Oh, God. God. Why? Why? How could I have done this? I don't even remember if I did it." When McDonough entered the room, Michael continued to

state that he didn't remember and asked "How can I not remember doing something like that? That's not possible." The interview ended shortly thereafter.

Michael was interviewed for a fourth and final time the following day, January 23, 1998, by Detectives Wrisley and Claytor. Prior to the interview, police contacted Dr. Lawrence Blum, a clinical psychologist, and asked him to consult with them during the interview. Dr. Blum was briefed by police, watched portions of the videos of Michael's previous interviews, and then observed the fourth interview from a monitoring room. Dr. Blum commented on Michael's demeanor, personality, and responses to questions. The interview lasted more than six hours.

During the interview Detectives Wrisley and Claytor took turns interrogating Michael. They employed a variety of tactics in an attempt to extract a confession from him. The first approach they took – which they repeated throughout the interview – was to tell Michael that they had evidence to prove he had killed his sister. They told him again that they found blood in his room, that they knew Michael had moved Stephanie, that they had proof that no one had entered the house and so Stephanie had to have been killed by a family member, and that they found blood in the bathroom sink.

Claytor told Michael that they were going to play a game, in which they would talk about the evidence and Michael would explain it. They started with the blood Claytor said was found in Michael's room.

When Michael said he didn't know how to explain it because he didn't know how it got there, Claytor told him that under the rules of the game Michael wasn't allowed to say "I don't know." As Claytor continued to push Michael, Michael gave responses such as "How am I supposed to tell you an answer that I don't have? I can't – it's not possible to tell you something I don't know," and "You keep asking me questions I can't answer. What do you want me to do? Make something up? Lie to you?"

Later, Wrisley tried to get Michael to describe stabbing Stephanie:

Q. What did you do?

A. I don't know. All I know that I did is what you told me. That's all I know.

Q. What did we tell you that you did?

A. You told me that I killed her.

Q. How?

A. I don't know. You asked me what I did with the knife, so I assume it was a knife. That's all I know.

Q. So what does the knife do? What's the knife got to do with it?

A. He asked me if I – what I did with the knife, but I can't – I don't know. That's all I know.

Q. Well, if there was a knife there and Stephanie was dead, what role did the knife play?

A. I don't know. They thought I killed her.

Q. How?

A. I don't know.

Q. Oh, come on, Michael.

A. I don't know. God.

Q. You played enough of these games. You know how the knives work.

A. They cut her.

Q. Is that a question?

A. I don't know. I can't really tell you.

Q. You know how knives work, Michael. That's a little insulting to say that in front of Ralph and I who investigate these cases all the time. Right?

A. I guess.

Q. You guess?

A. I don't know for sure. I guess it would be.

Q. So how is a knife used to kill somebody?

A. Maybe stab them.

Q. Where?

A. I don't know.

Q. Well, where would you think? If someone was going to die from being stabbed, where would they be stabbed?

A. In the head.

Q. Okay. Where else? Is that the only place?

A. Stomach. I don't know. The chest.

Q. The chest, in the head?

A. Yeah.

Q. Would they die from being stabbed in the stomach?

A. Eventually.

Q. Eventually?

A. Yes.

Q. Why?

A. They'd bleed to death.

Q. Would they?

A. I guess. I don't know.

Q. Well, are you basing that on some kind of rationale or are you just taking a flier out of it?

A. I told you. I don't remember what I did. I don't care if you think I'm just trying not to tell you. I don't care.

The detectives also followed up on the idea that Claytor had introduced the day before: that Michael

had killed his sister but did not remember. Throughout the entire 6-hour interview Michael repeatedly asserted that he did not remember killing his sister, to which the detectives insisted, "I'm helping you remember," and "I think you don't want to remember."

Earlier in the interview, Wrisley had also introduced the idea that there were "two Michaels," a "good Michael" and a "bad Michael":

> Q. Once everybody understands what's been going on, I know that people will be able to forgive, Michael.
>
> A. But I didn't do it.
>
> Q. You know, the good part of Michael didn't do it.
>
> A. I didn't.
>
> Q. The Michael that helps her with her math.
>
> A. I didn't. I didn't do this.
>
> Q. And I'm suggesting to you, Michael, that the Michael that has an opponent to defeat who has an incredible assortment of things at his disposal could be responsible for this.
>
> A. No. It's not true. I didn't do this.
>
> Q. Help me understand, Michael.
>
> A. I didn't do this.

When Claytor took over the interview, he continued with the theme of "two Michaels" and told him that people would understand, and that he wouldn't be held "to the same standards" because he was only 14. Michael eventually started to be influenced by the "two Michaels" theory, as is evident from his response to the following question:

> Q. – what's your greatest fear right now? What's the worst that you can imagine right now?
>
> A. I'm afraid that there is someone else inside of me. I don't know who they are. I don't know what they do. I don't – if what you're saying is true, then it's like there is another person in me then. I don't remember anything.

Finally, the detectives began to tell Michael that if he confessed he would get help rather than go to jail. This was the tactic that seems to ultimately have proved the most "effective." Claytor told Michael:

> Q. I'm not real sure how familiar you are with the system, but kind of the way it works is if the system has to prove it, yeah, it's jail. If they don't, then it's help. What that kinds of puts – or where that kind of puts us is in a position of you have these two roads to go. Which one are we going to go down?
>
> A. I told you.
>
> Q. What I'm really afraid of is that we're going down the make the system prove it.

And I know you're smart enough to know that that can be done quite easily.

Michael responded, "If I told you right now, I would be lying. You'd find out eventually. The evidence would say it's a (unintelligible). My story would be wrong. Then what would happen to me?"

But the detectives persisted and ultimately Wrisley extracted the following from Michael:

Q. Tell us.

A. If I tell you a story, the evidence is going to be a complete lie.

Q. Well, then, tell us the story.

A. Well, I'll lie. I'll have to make it up.

Q. Tell us the story, Michael.

A. You want me to tell you a little story?

Q. Tell us the story. What happened that night?

A. Okay. I'm going to warn you right now. It is a complete lie.

Q. Tell us the story.

A. Okay. This is true. I am extremely jealous of my sister.

Q. Okay.

A. She's always had a lot of friends and good friends and stuff like that. She was

friends with people my age, all the popular girls and stuff like that. That's true. Okay.

. . .

A. Okay. Here is the part where I'll start lying. That night I thought about her. I couldn't take it anymore. Okay. So I got a knife, went into her room and I stabbed her. I left her on her bed, picked her up off the bed, dropped her.

. . .

Q. How many times did you stab her?

A. It's going to be a lie. Three times.

. . .

Q. Tell me what the truth is.

A. The only reason I'm trying to lie here is because you presented me with two paths. I'd rather die than go to jail.

The detectives latched onto Michael's story as a confession. Throughout the remainder of the interview they tried to fill some of the holes in his story – including where he got the knife and what he did with it afterwards – but Michael was unable to give them any further information. At the end of the interview Michael said, "Like I said, the only way I even know I did this because she's dead and because the evidence says that I did. You could find someone else did it – and I pray to God someone else did. I think it's too late for that. I think I did it."

2. Aaron

Police first contacted Aaron Houser at his home on January 22, 1998. Aaron answered the door and said his parents were not home. The police then interviewed Aaron for 30 to 45 minutes regarding his friendship with Michael.

Aaron was interviewed a second time on January 27, 1998, by Detective Wrisley at the Escondido police station. The interview lasted approximately two hours. The interview primarily focused on Aaron's perception of Michael's relationship with his family. Wrisley asked Aaron whether Michael ever talked about hurting his family and whether Aaron thought Michael could have killed his sister. Aaron said he didn't think so. Aaron also told Wrisley that he had discovered that day that a knife he owned was apparently missing.[5]

On February 11, 1998, police arrested Aaron at his school and searched his home and locker. After arresting him, the police strip searched him, and then interrogated him for approximately 9.5 hours at the Escondido police station. He was interrogated, primarily by Detective McDonough, but also by defendants Sweeney, Wrisley, and Claytor.

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[5] Aaron had a collection of knives. His mother had reported to the police earlier that day that she noticed that one of his knives was missing.

In interrogating Aaron, the detectives used tactics similar to those they used against Michael. McDonough began the interrogation with the stress voice analyzer, describing it has he had for Michael. Eventually he began to ask Aaron to "theoretically" describe how he, Michael, and Joshua would each respectively kill Stephanie, if they were going to do so. McDonough suggested details to the story, through questions regarding what clothing Aaron would wear and how he would get rid of it, whether he would wear gloves, what time he would pick, and how he would get into the house. Later, McDonough told Aaron that Joshua and Michael had both said Aaron helped them kill Stephanie. Aaron denied it. Then McDonough told Aaron that the computer stress voice analyzer indicated that he was definitely involved. At this point Aaron began to even more vehemently protest his innocence:

> A. Let me put it this way: I don't know anything. I don't know who did. I don't know a single thing. I'm doing my best to tell the truth.
>
> Q. Aaron, calm down.
>
> A. I'm telling the truth to the best of my ability.
>
> Q. Calm down.
>
> A. How can I calm down? I'm being accused of murder?
>
> Q. Relax, Aaron.

A. How?

Q. Relax.

A. How? Relax how?

. . .

Q. You need to help yourself in the situation here, son.

A. What do I do?

Q. Tell the truth.

A. I did and you said I lied.

Q. Yes.

A. Okay.

Q. You lied. You have lied.

McDonough also told Aaron they had physical evidence against him and implied that they would soon uncover more.

When Detective Claytor took over the interview he began to tell Aaron how much easier things would be for him if he confessed:

Q. Here's the situation. You put us into a position by saying "Don't know what you're talking about. This is all bogus. Wasn't me. Didn't do it." It's what we call "The other dude did it."

A. Uh-huh.

Q. Now what that does is it puts you in kind of a bad light, because at some point

you may face a jury of average everyday citizens right off the street out here. . . .

A jury has a real difficult time convicting people of crimes, especially of this nature. Why? Because they don't want to believe that a person would do this. So what they do is deny away the evidence and look at the evidence and they say, "Good grief. How can he possibly sit here and say he didn't do it, because look what we have? We have this evidence, this evidence . . . "

They want to see an apology. They want to see someone who is willing to accept what's occurred.

. . .

Q. Now, two ways to go. You can force me to make you live with your denial, which I'll do. No problem at all. Or you can put me in a position to where I can write on a piece of paper, "We have a 15-year-old man here who made a very serious mistake. He's willing to talk to me, though. He's willing to fix it."

Aaron maintained his innocence through the end of the 9.5 hour interrogation, at which point the detectives arrested him and read his *Miranda* rights for the first time.

3. Joshua[6]

On January 22, 1998, police went to Joshua Treadway's house to interview him. Joshua answered the door and said that his parents were not at home. After entering the house, the police noticed a knife on the couch. Joshua said the knife belonged to his brother, though his brother later said it belonged to Joshua. The police asked Joshua questions about Michael and his friendship with Michael. The interview lasted approximately one hour.

On January 27, 1998, police searched the Treadway house and recovered a knife, which Aaron later identified as the knife he had reported missing. That day, Joshua was interrogated for approximately 13.5 hours. The interview began around 7:00 p.m. at Joshua's home, continued around 9:00 p.m. at the Escondido police station, and concluded around 8:30 a.m. Joshua was interrogated by Detectives Claytor, Sweeney, and McDonough. Joshua was never Mirandized during the course of the interrogation.

The detectives employed similar techniques as they had during the interrogations of Michael and Aaron. Detective Claytor alternated between promising Joshua leniency and threatening him with punishment. Detective McDonough took over around 3:00 a.m. and used the computer stress voice analyzer, describing the device to Joshua in the same way as he

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[6] Although the Treadways were parties in the district court, they are not parties to this appeal.

had to Michael and Aaron. Detective McDonough's portion of the interview continued for several hours and he repeatedly denied Joshua's requests for sleep. Ultimately Joshua broke down and told McDonough that Aaron had given him the knife used to kill Stephanie. At this point, McDonough told him that the stress voice analyzer device indicated that he had "passed."

On January 31, 1998, Detectives Claytor and Anderson convinced Joshua to call Aaron and accuse him of complicity in Stephanie's murder while they monitored the call. Aaron denied any involvement.

On February 10, 1998, Joshua was interrogated a third time for approximately 12 hours, with a two-hour break, at the Escondido police station, by Detectives Claytor and McDonough, with the consultation of Dr. Blum. The detectives again used similar techniques and ultimately Joshua gave a more in-depth confession, which, although detailed, was both internally inconsistent and inconsistent with other information the police had at their disposal. At the conclusion of the interview, the police arrested Joshua and Mirandized him for the first time.

C. *Pre-Trial Proceedings*

Statements obtained from the boys during their interrogations were introduced during at least three pre-trial proceedings. First, in April 1998, a "*Dennis*

H. Hearing,"[7] was held and resulted in Aaron and Joshua spending several months in jail while awaiting trial.[8] The boys' statements were introduced. The statements were next introduced during the grand jury proceedings in May 1998. On May 22, 1998, the grand jury issued indictments against the three boys for murder and conspiracy to commit a crime. Finally, in July 1998, a "707 Hearing"[9] was held to determine if the boys would be tried as juveniles or adults. The boys' statements were again introduced.

On December 17, 1998, the state court held a suppression hearing in which the court considered, amongst other motions in limine, the defense's motions to suppress the three boys' statements. The court suppressed the majority of Michael's third interrogation and all of his fourth interrogation on the ground of coercion. The court found that starting early in the third interrogation, "there was commenced a coercive scheme, whether intentional or

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[7] Under California law, when a minor is taken into custody by a police officer, he must be released within 48 hours from the time of his apprehension, unless within that time a petition is filed in the juvenile court or a criminal complaint is filed with a court of competent jurisdiction explaining why the minor should be declared a ward of the court. *See* Cal. Welf. & Inst. Code § 631. Such a hearing is called a "*Dennis H.* Hearing." *See In re Dennis H.*, 19 Cal. App. 3d 350, 354 (Cal. App. 1971).

[8] The record is unclear as to when Michael was incarcerated.

[9] A "707 Hearing" is held to determine whether a minor should be tried in juvenile or adult court. *See* Cal. Welf. & Inst. Code § 707.

unintentional; it culminated in the adoption of what we have come to refer to as the 'good Michael, bad Michael' approach. Where, in essence, the defendant, Mr. Crowe, was told if he confessed, if he provided information, he would receive treatment." The court suppressed all of Aaron's statements on the ground that Aaron had not been Mirandized. Finally, the court suppressed Joshua's second interrogation on the ground of coercion and the pre-arrest portion of his third interrogation on the ground that he had not been Mirandized. The court then set a trial date in January 1999.

D. *Dismissals of Indictments and Prosecution of Tuite*

On October 27, 1998, pieces of Tuite's clothing, which had been collected when police first interviewed Tuite on January 21, 1998, were sent to a laboratory for forensic testing, at the joint request of Joshua Treadway's defense attorney and the prosecution. The clothing included the long-sleeved red shirt Tuite had been wearing when police brought him in for questioning on January 21, 1998.[10] On January 14, 1999, the forensic laboratory notified the prosecution that DNA results showed that Tuite's red shirt contained spots of Stephanie Crowe's blood. On February

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[10] Tuite's clothing had apparently been examined previously in April of 1998, but visual inspections did not detect any blood on Tuite's red shirt.

25, 1999, the prosecution filed a Motion to Dismiss the indictments against the boys.

Tuite was eventually charged and tried for Stephanie Crowe's murder. On May 26, 2004, a jury convicted Tuite of voluntary manslaughter.

E. *§ 1983 Action*

After the charges against them were dismissed, the boys and their families[11] filed three separate complaints in state court alleging violations of 42 U.S.C. § 1983 and various state-law torts. The defendants removed the complaints to federal court, and the district court consolidated the actions and ordered the plaintiffs to file a joint complaint. The plaintiffs filed their Joint First Amended Complaint on April 24, 2000. The following defendants are parties to this appeal: the City of Escondido and Escondido Police Detectives Mark WRISLEY, Phil Anderson, Barry Sweeney, and Ralph CLAYTOR (collectively "the Escondido defendants"); the City of Oceanside and Oceanside Police Detective Chris McDonough (collectively "the Oceanside defendants"); Dr. Lawrence Blum; and Assistant District Attorney Summer Stephan.

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[11] Michael, Stephen, Cheryl, Judith Ann, and Shannon Crowe; Aaron, Margaret Susan, and Gregg Houser; and Joshua David, Zachary, Michael Lee, and Tammy Treadway.

The Escondido defendants filed a motion to dismiss, which was granted in part on July 26, 2000. Defendants then filed multiple motions for summary judgment on qualified immunity grounds. The district court granted portions of these motions on February 17, 2004. *Crowe v. County of San Diego,* 303 F. Supp. 2d 1050 (S.D. Cal. 2004) ("*Crowe I*"). The Escondido defendants subsequently filed motions for summary judgment, again on qualified immunity grounds, as to the remainder of the claims pending against them. The district court granted those motions, in part, on February 28, 2005. *Crowe v. County of San Diego,* 359 F. Supp. 2d 994 (S.D. Cal. 2005) ("*Crowe II*").

The Crowes and the Housers appeal the district court's grant of summary judgment, on qualified immunity grounds, as to (1) Michael and Aaron's Fifth Amendment claims, (2) Michael and Aaron's Fourteenth Amendment substantive due process claims, (3) Michael and Aaron's various Fourth Amendment claims, (4) the Crowes' and Housers' Fourteenth Amendment deprivation of familial companionship claims, (5) Michael and Aaron's defamation claims, and (6) the Crowes' and Housers' claims of municipal liability against the City of Escondido and the City of Oceanside.

The Escondido defendants cross-appeal the district court's denial of summary judgment, on qualified immunity grounds, as to (1) Fourth Amendment claims stemming from the nude photographing of Cheryl, Stephen and Shannon Crowe, (2) Fourth

Amendment claims stemming from the taking of blood samples from Cheryl and Stephen Crowe, (3) Fourth Amendment claims stemming from the detention of Cheryl and Stephen Crowe, and (4) the Crowes' Fourteenth Amendment deprivation of familial companionship claim based on the placement of Michael and Shannon Crowe in protective custody.

Defendants asserted qualified immunity in each of their summary judgment motions. To determine whether a government employee is entitled to qualified immunity, we use a two-part test. *Saucier v. Katz,* 533 U.S. 194, 201 (2001). First, we must determine whether, viewed in the light most favorable to the plaintiff, the government employees violated the plaintiff's constitutional rights. *Id.* Then, if we determine that a constitutional violation has occurred, the court must determine whether the rights were clearly established at the time of the violation. *Id.* For each claim on which the district court granted summary judgment, the district court held that there was no constitutional violation, but that even if there was a violation, it was not clearly established.

We review de novo a district court's decision to grant or deny summary judgment on the ground of qualified immunity. *Motley v. Parks,* 383 F.3d 1058, 1062 (9th Cir. 2004). We must view the evidence "in the light most favorable" to the plaintiffs to determine if there was no genuine issue as to any material fact and whether the defendants were entitled to judgment as a matter of law. *Mueller v. Auker,* 576 F.3d 979, 991 (9th Cir. 2009). In doing so,

all justifiable inferences are to be drawn in favor of the plaintiffs. *Id.*

II. Fifth Amendment Claims

Michael and Aaron allege that defendants Blum, Wrisley, Sweeney, Claytor, McDonough, and Anderson violated their Fifth Amendment privilege against compelled self-incrimination. The district court granted summary judgment in favor of defendants, relying primarily on its interpretation of *Chavez v. Martinez,* 538 U.S. 760 (2003). *Crowe I,* 303 F. Supp. 2d at 1091-93; *Crowe II,* 359 F. Supp. 2d at 1030. Prior to *Chavez,* the rule in our Circuit was that a § 1983 cause of action for a violation of the Fifth Amendment's Self-Incrimination Clause arose as soon as police employed coercive means to compel a statement. *See Cooper v. Dupnik,* 963 F.2d 1220, 1242 (9th Cir. 1992). In *Chavez,* the Supreme Court held that mere coercion does not create a cause of action under § 1983 for a violation of the Self-Incrimination Clause, absent use of the compelled statement in a criminal case.

As we have recently held, however, *Chavez* does not preclude § 1983 claims for Fifth Amendment violations when the coerced confession is used in certain pre-trial proceedings. *See Stoot v. City of Everett,* No. 07-35425, 2009 WL 2973229, at *13 (9th Cir. Sept. 18, 2009). Because statements obtained during Michael's and Aaron's interrogations were used in pre-trial proceedings of the type discussed in *Stoot,* namely the "*Dennis H.*" hearing, the grand jury

proceedings, and the 707 hearing, we must reverse the district court's grant of summary judgment.

A

We begin with *Chavez,* which provides the underpinnings of our analysis. *Chavez* involved a § 1983 case arising out of the coerced confession of Oliverio Martinez. Two police officers became involved in an altercation with Martinez and one of the officers ultimately shot Martinez several times, causing severe injuries including blindness and paralysis. *Chavez,* 538 U.S. at 764. The officers then arrested Martinez and sent him to a hospital with paramedics. *Id.* At the hospital, another officer, Chavez, questioned Martinez while he was receiving medical treatment. *Id.* During the questioning, Martinez was in severe pain and stated several times that he was dying. *Id.* at 784-86 (Stevens, J., concurring in part and dissenting in part). Martinez was never *Mirandized* and was never ultimately charged with a crime. *Id.* at 764.

Martinez filed suit under § 1983, alleging that the questioning violated his Fifth Amendment right to be free from compelled self-incrimination, as well as his Fourteenth Amendment substantive due process rights. *Id.* at 764-65. The district court granted summary judgment in favor of Martinez as to Chavez's qualified immunity defense, and we affirmed. *Martinez v. Oxnard,* 270 F.3d 852 (9th Cir. 2001). The Supreme Court reversed. Both Justices

enough to doom his claim. *Id.* at 777. While the "core of Fifth Amendment protection" concerns the use of a compelled statement in a criminal case, the Fifth Amendment also protects in situations where "the core guarantee, or the judicial capacity to protect it, would be placed at some risk in the absence of such complementary protection." *Id.* at 777-78. This is why, Justice Souter explained, the Fifth Amendment also provides protection in "non-core" situations such as compelled testimony in a civil case. *Id.* (*citing McCarthy v. Arndstein,* 266 U.S. 34, 40 (1924)).[12]

Recently, we have clarified "the precise moment when a 'criminal case' commences." In *Stoot,* we held that "[a] coerced statement has been 'used' in a criminal case when it has been relied upon to file formal charges against the declarant, to determine judicially that the prosecution may proceed, and to determine pretrial custody status." *Stoot,* 2009 WL 2973229, at *13.

B

With that background, we consider the procedural posture in the instant case. In granting summary judgment for defendants, the district court concluded

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[12] Part II of Justice Souter's opinion, which was the only part of any of the six opinions joined by a majority of the Court, held that Martinez might be able to pursue a claim for violation of his substantive due process rights and remanded on that issue.

that Michael and Aaron's Fifth Amendment claims failed for two reasons. First, the district court interpreted *Chavez* to require that a compelled statement be introduced in a criminal trial in order to create a Fifth Amendment cause of action. *Crowe I*, 303 F. Supp. 2d at 1091. Second, the district court concluded that a Fifth Amendment cause of action can *never* arise against a police officer, because the harm is the introduction of the statement at trial and the police officer will never be the proximate cause of that harm. *Id.* at 1091-92. The district court did not have the benefit of *Stoot* when issuing its opinion. Nevertheless, *Stoot* makes clear that the district court erred in both conclusions. We thus reverse the grant of summary judgment as to Michael and Aaron's Fifth Amendment claims.[13]

In contrast to the facts in *Chavez*, the prosecution of Michael and Aaron did not cease with the boys' interrogations. Rather, the boys were indicted and the case against them continued for a year, up and until the eve of trial. During this time, statements obtained during the boys' interrogations were used in several pre-trial proceedings, including a "*Dennis H.* Hearing," the grand jury proceedings, and a "707 Hearing." Following *Stoot*, we hold that the use of Michael's and Aaron's statements in the pre-trial proceedings gives rise to a Fifth Amendment cause of action.

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[13] *See infra* Part VIII.B for discussion of the claims against Blum.

All three pre-trial proceedings in which Michael and Aaron's statements were used gave rise to a Fifth Amendment cause of action. The "707 hearing" was held to determine whether the boys would be incarcerated in Juvenile Detention prior to trial. Pre-trial incarceration is a deprivation of liberty and an important part of any "criminal case."

A grand jury proceeding is at the heart of a "criminal case." Without an indictment, there is no trial. In considering a similar question, albeit in a different context, the Supreme Court held that the Fifth Amendment applies in the grand jury context even if the evidence is not used at trial. *United States v. Hubbell,* 530 U.S. 27, 41 (2000). In *Hubbell,* the Court considered whether the use of documents, produced by a defendant pursuant to a subpoena, to obtain an indictment against that defendant violated his Fifth Amendment right to be free from self-incrimination. The Court held that it did, *id.* at 41, and held that the documents need not be introduced at trial to complete the Fifth Amendment violation, *id.* at 43. The government had argued that it would not need to introduce the documents used to indict in the actual trial and that the defendant's Fifth Amendment rights would therefore never be violated. The Court firmly rejected that argument: "In sum, we have no doubt that the constitutional privilege against self-incrimination protects the target of a grand jury investigation from being compelled to answer questions designed to elicit information about the existence of sources of potentially incriminating

evidence." *Id.* at 43. Applying *Hubbell* in this context leads to a similar conclusion.

Finally, a "*Dennis H.* hearing" is yet another important part of a "criminal case." The outcome of such a hearing is not merely a choice of venue, but a determination of maximum punishment. As the California Supreme Court has noted, "the certification of a juvenile offender to an adult court has been accurately characterized as 'the worst punishment the juvenile system is empowered to inflict.'" *Ramona R. v. Superior Court,* 37 Cal. 3d 802, 810 (1985) (quoting Note, *Separating the Criminal from the Delinquent: Due Process in Certification Procedure,* 40 S. Cal. L. Rev. 158, 162 (1967)).[14] Thus, all of the pretrial proceedings in which plaintiffs' Fifth Amendment rights were violated give rise to § 1983 claims.

The district court also granted summary judgment on the ground that Michael and Aaron's Fifth Amendment claims failed because the police officer defendants were not the proximate cause of the harm. *Crowe I,* 303 F. Supp. 2d at 1091-92. The court reasoned that harm only arises when a coerced statement is admitted in court, whether during a trial or pre-trial proceeding. Thus, "it cannot be said that a police officer is the proximate cause of such a

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[14] Michael additionally argues that the use of his statements at Tuite's trial creates a cause of action. This argument has no merit because Michael's liberty was neither infringed nor threatened by the use of his statements in Tuite's trial.

violation . . . [because] it is the prosecutor, not the police officer, who decides to introduce and actually introduces the statement into evidence. Moreover, . . . it is the trial judge who ultimately determines whether the statement will be admitted." *Id.* at 1091. This conclusion is foreclosed by our decision in *Stoot*. *See* 2009 WL 2973229, at *13-*14.

The district court's reasoning would effectively bar *any* § 1983 action for a violation of the Self-Incrimination Clause. A police officer will never "actually introduce[ ] the statement into evidence" and prosecutors and judges have absolute immunity for any act performed in their prosecutorial and judicial capacities. *See Stump v. Sparkman,* 435 U.S. 349 (1978) (judicial immunity); *Imbler v. Pachtman,* 424 U.S. 409 (1976) (prosecutorial immunity). Such a rule is in direct conflict with "[t]he purpose of § 1983 [which] is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights." *McDade v. West,* 223 F.3d 1135, 1139 (9th Cir. 2000). If a plaintiff could *never* bring a § 1983 action for a violation of the Self-Incrimination Clause, the statute would be robbed of its purpose.

Further, in the context of § 1983 claims, we have explained that "[t]he requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." *Johnson v. Duffy,*

588 F.2d 740, 743-44 (9th Cir. 1978). When a police officer questions a suspect, he knows that any statement the suspect gives may be used to prosecute that suspect. *A fortiori,* he knows that an obtained *confession* will almost certainly be used to prosecute. Thus, while the officer may not actually introduce the statement into court, coercing the confession "set[s] in motion a series of acts by others which the [officer] knows or reasonably should know would cause" the statement to be introduced. *See Stoot,* 2009 WL 2973228, at *14 ("Like the other circuits to address this question, we conclude that, absent unusual circumstances, a police officer eliciting incriminating statements from a criminal suspect 'could reasonably have foreseen that a coerced confession would be used against [the suspect] and would lead to [the suspect's] detention.'" (quoting *Higazy v. Templeton,* 505 F.3d 161, 177 (2d Cir. 2007) (alterations in original))). The defendants were unquestionably a proximate cause of the violations of Michael and Aaron's Fifth Amendment rights.

In summary, we hold that a Fifth Amendment cause of action against the relevant defendants arose when Michael and Aaron's coerced statements were introduced against them during pre-trial proceedings.

Further, the defendants are not entitled to qualified immunity. In 1998, when defendants interrogated Michael and Aaron, the clearly established rule in this Circuit was that a § 1983 cause of action for a violation of the Fifth Amendment's Self-Incrimination Clause arose as soon as police employed coercive

means to compel a statement. *See Cooper,* 963 F.2d at 1242; *see also Stoot,* 2009 WL 2973229, at *14-*15 (denying qualified immunity for a similar claim). As such, defendants cannot claim the protection of qualified immunity. *See Saucier,* 533 U.S. at 201.

III. Substantive Due Process Claims

The Due Process Clause of the Fourteenth Amendment protects against any government conduct that "shocks the conscience." *Rochin v. California,* 342 U.S. 165, 172 (1952). Michael and Aaron allege that defendants Blum, Wrisley, Sweeney, Claytor, McDonough, and Anderson violated their Fourteenth Amendment substantive due process rights by using interrogation techniques so coercive as to "shock the conscience." The district court granted summary judgment for defendants, concluding that the defendants' actions did not "shock the conscience." *Crowe I,* 303 F. Supp. 2d at 1096; *Crowe II,* 359 F. Supp. 2d at 1034.

We have previously explained that police conduct need not include physical violence to violate substantive due process. *See, e.g., Cooper,* 963 F.2d at 1249-50, *abrogated on other grounds by Chavez,* 538 U.S. at 780 (holding that police interrogation plan to ignore suspect's requests for an attorney and relentlessly interrogate him violated the suspect's substantive due process rights); *Wood v. Ostrander,* 879 F.2d 583, 589 (9th Cir. 1989) ("While brutality by police or prison guards is one paradigmatic example of a

substantive due process violation, it does not exhaust the possibilities."). It has also long been established that the constitutionality of interrogation techniques is judged by a higher standard when police interrogate a minor. *See In re Gault,* 387 U.S. 1, 55 (1967) (In an interrogation of a minor, "the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.").

The Crowes and the Housers presented testimony from several expert and lay witnesses in support of their argument that the interrogations of Michael and Aaron violated the boys' substantive due process rights. Dr. Richard Leo, an expert in coerced confessions, described Michael's interrogation as "the most psychologically brutal interrogation and tortured confession that I have ever observed." Dr. Calvin Colarusso, Director of Child Psychiatry Residence Training Program at the University of California, San Diego, conducted a psychiatric evaluation of Michael and characterized his interrogation as "the most extreme form of emotional child abuse that I have ever observed in my nearly forty years of observing and working with children and adolescents." Robert Puglia, former Chief Deputy District Attorney for Sacramento County, testified in a sworn declaration that Michael's statements were the product of a "coercive police scheme." And finally, a juror in Tuite's criminal trial, who viewed the videotapes of the boys'

interrogations, described the interrogations as "brutal and inhumane" and "psychological torture."

One need only read the transcripts of the boys' interrogations, or watch the videotapes, to understand how thoroughly the defendants' conduct in this case "shocks the conscience." Michael and Aaron – 14 and 15 years old, respectively[15] – were isolated and subjected to hours and hours of interrogation during which they were cajoled, threatened, lied to, and relentlessly pressured by teams of police officers. "Psychological torture" is not an inapt description. In *Cooper,* we held that police violated an *adult* suspect's substantive due process rights when they "ignored Cooper's repeated requests to speak with an attorney, deliberately infringed on his Constitutional right to remain silent, and relentlessly interrogated him in an attempt to extract a confession." 963 F.2d at 1223. The interrogations of Michael and Aaron are no less shocking. Indeed, they are more so given that the boys' interrogations were significantly longer than Coopers's,[16] the boys were minors, and Michael was in shock over his sister's brutal murder. The interrogations violated Michael's and Aaron's Fourteenth Amendment rights to substantive due process.

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[15] Aaron was interrogated on his fifteenth birthday.

[16] Cooper was interrogated once for four hours. *Cooper,* 963 F.2d at 1237. Michael was interrogated four times and Aaron was interrogated twice, each for over 10 hours.

Further, defendants are not entitled to qualified immunity because it was clearly established, at the time of the boys' interrogations, that the interrogation techniques defendants chose to use "shock the conscience." Defendants had the benefit of this Court's holding in *Cooper,* as well as Supreme Court case law directing that the interrogation of a minor be conducted with "the greatest care," *In re Gault,* 387 U.S. at 55. Just as in *Cooper,* here, "[q]ualified immunity is manifestly inapplicable." 963 F.2d at 1251.

IV. Probable Cause Claims

A. *Michael's Arrest*

Michael was arrested on January 23, 1998, after his fourth and final interrogation. *Crowe I,* 303 F. Supp. 2d at 1059. Michael alleges that, considering all information known to the officers at the time of his arrest, there was no probable cause to arrest him. The district court granted summary judgment in favor of defendants. *Crowe II,* 359 F. Supp. 2d at 1007. We affirm the district court on the alternate grounds that the defendants were entitled to qualified immunity as to this claim.

"Probable cause for a warrantless arrest arises when the facts and circumstances within the officer's knowledge are sufficient to warrant a prudent person to believe that the suspect has committed . . . an offense." *Barry v. Fowler,* 902 F.2d 770, 773 (9th Cir. 1990) (internal quotation marks omitted). In determining whether there was probable cause to arrest,

we look to "the totality of circumstances known to the arresting officers, [to determine if] a prudent person would have concluded there was a fair probability that [the defendant] had committed a crime." *United States v. Smith*, 790 F.2d 789, 792 (9th Cir. 1986). While evidence supporting probable cause need not be admissible in court, it must be "legally sufficient and reliable." *Franklin v. Fox*, 312 F.3d 423, 438 (9th Cir. 2002). As we have discussed, *see supra* Parts III and IV, the interrogations of Michael violated his Fifth and Fourteenth Amendment rights. As the district court properly concluded, such coerced confessions are legally insufficient and unreliable and thus cannot factor into the probable cause analysis.

Excluding Michael's coerced statements, at the time of Michael's arrest, police had the following information which could support a theory that Michael was responsible: (1) Michael stated he thought Stephanie's door was closed at a time – 4:30 a.m. – when the officers could reasonably believe her body was lying in her doorway blocking the door;[17] (2) no one else in the house heard anyone enter or exit the

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[17] There is some dispute among the parties regarding whether Stephanie's body was actually in the doorway – preventing the door from being closed – at 4:30 a.m. However, given that her body was in that position when paramedics and police arrived a couple hours later and no one seems to have clearly stated at the time that someone moved the body, a reasonable police officer certainly could have believed that Stephanie's body was in that position from the time she died until the time she was discovered the next morning.

house during the night;[18] and (3) the family dog did not bark during the night. *Crowe II*, 359 F. Supp. 2d at 1007-17. On the other hand, the police also had the following information which suggests that someone other than Michael could have been responsible: (1) eye witness accounts had placed Richard Tuite in the Crowe's neighborhood and described him as loud, drunk or high, agitated, and knocking on doors looking for "Tracy"; (2) just before 10:00 p.m. an officer investigating the complaints about Tuite saw a door to the Crowe house shut but did not see who shut it; (3) the Crowe family reported that everyone was in bed before 10:00 p.m.; (4) an outside door to the master bedroom and the window in Stephanie's room were not locked during the night. Although "police may rely on the totality of facts available to them in establishing probable cause, they also may not disregard facts tending to dissipate probable cause." *United States v. Ortiz-Hernandez*, 427 F.3d 567, 574 (9th Cir. 2005).

We decline to determine whether the police had sufficient probable cause to arrest Michael. Instead, we exercise our "sound discretion" and address the second prong of the qualified immunity analysis: whether the unconstitutionality of the officers' conduct was clearly established. *See Pearson*, 129 S. Ct. at 818. We conclude that it was not.

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[18] There was also no sign of forced entry, but this fact is largely negated by the fact that at least some doors and windows to the house were unlocked.

The Supreme Court has held that "it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). When that happens, the officials "should not be held personally liable." *Id.* We have held that officers are immune from suit "when they reasonably believe that probable cause existed, even though it is subsequently concluded that it did not, because they 'cannot be expected to predict what federal judges frequently have considerable difficulty in deciding and about which they frequently differ among themselves.'" *Smiddy v. Varney*, 665 F.2d 261, 269 (9th Cir. 1981) (quoting *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339, 1349 (2d Cir. 1972) (Lumbard, J., concurring)), *overruled on different grounds by Beck v. City of Upland*, 527 F.3d 853, 865 (9th Cir. 2008).

Defendants are entitled to qualified immunity because they could have reasonably believed that probable cause existed. Michael had stated that when he woke up in the middle of the night he saw nothing unusual, even though Stephanie's room was near Michael's room and the detectives believed that by that time, Stephanie was dead in her doorway. In addition, there were no signs of forced entry, suggesting that the murderer might have had access to the inside of the house. Finally, the information that the officers had regarding Tuite was not sufficiently strong to compel a reasonable officer to believe that Michael was not the most likely suspect.

In sum, although we make no judgment on whether "the facts and circumstances within the officer's knowledge [were] sufficient to warrant a prudent person to believe that" Michael committed the murder, *Barry*, 902 F.2d at 773, we hold that the officers are entitled to qualified immunity on this claim because a reasonable officer could have believed that probable cause existed.

B. *Aaron's Arrest*

Aaron similarly challenges the sufficiency of the probable cause justifying his arrest on February 11, 1998. The district court granted summary judgment in favor of defendants. *Crowe I*, 303 F. Supp. 2d at 1085. Because police had additional information suggesting Aaron's involvement by the time of his arrest, we affirm the district court's conclusion that there was sufficient probable cause.

In addition to the information available at the time of Michael's arrest, the police also had the benefit of the following information implicating Aaron when they arrested him: (1) Joshua's statement that Aaron had given him a knife and told him that the knife was the knife used to kill Stephanie and that Aaron had participated in the killing with Michael[19] (2) the knife used to kill Stephanie fit the description

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[19] The district court concluded that this part of Joshua's February 10, 1998 statement was uncoerced. *Id.* at 1083. Michael and Aaron have not challenged this finding.

of Aaron's knife; (3) Aaron's knife was found under Joshua's bed. *Id.* at 1084-85. This information – even in light of the information regarding Tuite – is sufficient to cause a prudent person to conclude that there was a reasonable possibility that Aaron was involved in Stephanie's death. The district court properly granted summary judgment in favor of defendants.

C. *Searches of Aaron's Home*

Police twice obtained search warrants and searched the Houser residence, on January 27, 1998 and February 11, 1998. *Id.* at 1079, 1082. The district court held that both search warrants were supported by probable cause. *Id.* at 1079-80, 1082-84. Aaron argues the district court erred because police deliberately made material misrepresentations in obtaining the search warrants.

Probable cause exists when "given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates,* 462 U.S. 213, 238-39 (1983). In reviewing a search warrant on probable cause grounds, this Court, like the district court, is "limited to the information and circumstances contained within the four corners of the underlying affidavit." *United States v. Stanert,* 762 F.2d 775, 778, *amended on other grounds,* 769 F.2d 1410 (9th Cir. 1985). The evidence in the affidavit need not necessarily be admissible, but must be

"legally sufficient and reliable." *Franklin,* 312 F.3d at 438.

A misrepresentation in the affidavit constitutes a violation of the Fourth Amendment if the misrepresentation is material. *See Franks v. Delaware,* 438 U.S. 154, 171-72 (1978). Misrepresentations can be affirmative or based on omission. Affirmative misrepresentations are material only if there is no probable cause absent consideration of the misrepresented facts. *Id.* A misrepresentation based on an omission is material only where the omitted facts "cast doubt on the existence of probable cause." *United States v. Garza,* 980 F.2d 546, 551 (9th Cir. 1992) (internal quotation marks omitted). If a plaintiff is able to demonstrate that a warrant was issued as the result of a material misrepresentation, a police officer defendant may still be entitled to summary judgment on qualified immunity grounds, unless the plaintiff can also demonstrate that the police officer deliberately falsified information presented to the magistrate or recklessly disregarded the truth. *Hervey v. Estes,* 65 F.3d 784, 789 (9th Cir. 1995).

Thus, to determine whether the two warrants were supported by probable cause, we must exclude any misrepresentation contained in supporting affidavits, add any information which was improperly omitted from the affidavits, and then determine whether the remaining information is sufficient to create probable cause. We conclude that only the second warrant was supported by sufficient probable cause, but also that the first warrant does

not conclusively demonstrate a deliberate falsification of information or reckless disregard for the truth such that defendants are entitled to qualified immunity. We therefore, affirm the district court's grant of summary judgment as to both warrants.

1. January 27 Search

The affidavit in support of the January 27 warrant contained the following information, as summarized by the district court, none of which can fairly be characterized as a misrepresentation:

> Defendant Claytor told Detective Han that multiple stab wounds were found on Stephanie's body and those wounds were consistent with a 5-6 inch knife blade. Through interviews, the investigation revealed that Michael Crowe and Aaron Houser are friends. On 1-22-98, detectives Lanigan and Naranjo interviewed Aaron Houser at his residence. Aaron told Detective Naranjo and Lanigan that he and Michael had been friends for over a year and had mutual interest in computer games and in medieval fantasy role play games as well as in weapons, including swords, knives, dirks and daggers. Aaron told the detectives that Michael knew that he had a medieval sword and knife collection but that he had never lent Michael any of his collection. On 1-27-98, Detective J. Lanigan received a telephone call from Margaret Houser, Aaron's mother. Margaret Houser told Detective Lanigan that Aaron had

> checked his medieval sword and knife collection and that one of the knives was missing. The missing knife was described as being stainless steel in color, with black plastic inserts on the handle and a 4-5 inch blade that came to a point and was sharpened. The knife was further described as having a hand stop and has indentations to facilitate a firmer grip.

Crowe I, 303 F. Supp. 2d at 1078. This information is sufficient to establish probable cause to search the Houser residence. However, we must also determine whether police made any material omissions in the affidavit which would cast doubt on the existence of probable cause.

Aaron argues that police deliberately omitted material information regarding Tuite and the fact of unlocked doors and windows in the Crowe house. It is true that there was information known to the police at the time of the affidavit that now appears material, particularly the actions of Tuite, that the police did not include in the affidavit. "[W]here omissions are involved materiality may not have been clear at the time the officer decided what to include in, and what to exclude from, the affidavit. In such cases, when it is not plain that a neutral magistrate would not have issued the warrant, the shield of qualified immunity should not be lost, because a reasonably well-trained officer would not have known that the misstatement or omission would have any effect on

issuing the warrant." *Lombardi v. City of El Cajon*, 117 F.3d 1117, 1126 (9th Cir. 1997).

California Municipal Judge Ramirez, who signed the warrant, stated later that had he known "that the sliding glass door in the bedroom was unlocked and partially open, and that a transient had been knocking on doors looking for a female I would have asked more questions and required more information before signing the search warrant." While this would suggest it is plain the magistrate would not have issued the warrant, the even unconscious benefit of hindsight cannot be overlooked here. For example, at the time, Cheryl Crowe's testimony indicated that she was in her bedroom, awake, until 11 p.m., which is the latest time Stephanie could have been alive. Therefore, it was not necessarily reckless for police to assume no one could have entered through the door while Cheryl was awake, and she was awake during the entire time Stephanie could have been murdered.

There appears to be enough uncertainty around the state of the windows and doors that given the information known to the police at that time, it would not have been plain that *any* magistrate would not have issued the warrant, even if it appears now, given all the information, that perhaps the warrant should not have issued. Therefore, while not deciding whether the omissions in the affidavit were sufficiently material misrepresentations to constitute a violation

of the Fourth Amendment,[20] we find the defendants entitled to qualified immunity on this point, and affirm the district court's grant of summary judgment.

2. February 11 Search

The February 11 search warrant was based on: (1) the fact that Michael was arrested for Stephanie's murder and Michael's friendship with Aaron and Joshua; (2) the first interview of Joshua, at his home, during which a knife was seen in his possession; (3) the search of the Treadway residence which uncovered a knife that Aaron had reported missing; (4) the January 27 search of the Houser residence; (5) information gained from Joshua's statements during interrogation. *Crowe I,* 303 F. Supp. 2d at 1082-83. Some of the information gained during Joshua's interrogation must be excluded. *See Franklin,* 312 F.3d at 438 (information in a supporting affidavit must be "legally sufficient and reliable"). As discussed previously, the district court determined that the latter portion of Joshua's February 10 interrogation was coerced.[21] *See Crowe I,* 303 F. Supp. 2d at 1081. During the uncoerced part of his

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[20] Here we exercise the discretion given in the Supreme Court's recent decision, *Pearson v. Callahan,* 129 S. Ct. 808, 818 (2009), to decide the issue of whether the violation was clearly established without deciding whether there was actually a violation in the case.

[21] Defendants have not disputed this finding on appeal.

interrogation, Joshua stated that Aaron had given him a knife and told him that the knife was used to kill Stephanie and that he (Joshua) had agreed to hide the knife. *Id.* Any other information, which was gained as a result of coercion, must be excluded from the probable cause analysis. Any information gained during the January 27 search of the Houser residence must also be excluded, as there was insufficient probable cause to search the house at that time.

Thus, the information properly included in the affidavit was Michael's arrest, the search of the Treadway residence, the initial interview of Joshua, and the information from the uncoerced portion of Joshua's February 10 interrogation. Evaluating the information as a whole, there was a fair probability that evidence related to the death of Stephanie Crowe would be found at the Houser residence. *See Gates,* 462 U.S. at 238-39. The search warrant was supported by sufficient probable cause. Accordingly, we affirm the district court's grant of summary judgment as to the February 11 search.

V. Strip Searches

On January 21, 1998, Michael, Cheryl, Stephen, and Shannon Crowe were strip searched and photographed nude or semi-nude. The Crowes argue that these searches violated their Fourth Amendment rights. In response, defendants argue that the searches were conducted pursuant to valid consent and were thus constitutional. *See United States v.*

Patayan Soriano, 361 F.3d 494, 501 (9th Cir. 2004) (searches conducted pursuant to valid consent are constitutional). The district court granted summary judgment in favor of defendants with respect to Michael's claim, but denied summary judgment with respect to the claims of the remainder of the Crowe family. *Crowe II,* 359 F. Supp. 2d at 1021-23. We affirm.

Michael argues that although he did consent to the strip search, his consent was obtained by coercion. It has long been established that consent to search must be given freely and voluntarily. *See, e.g., Bumper v. North Carolina,* 391 U.S. 543, 548 (1968). Whether consent was voluntarily given must be determined by evaluating the totality of the circumstances and the government has the burden to proof. *Patayan Soriano,* 361 F.3d at 501. However, at his deposition Michael testified as follows:

> Q. Do you recall anything else your father said about the subject of the photographs?
>
> A. Later, right before he did it, he told us to go ahead and do it and help them out. Just do whatever we could to help.
>
> Q. Did he say why he wanted you to go ahead and do the photos to help out?
>
> A. He just told us to go do the photos to help out.
>
> Q. When he said to help out, did you understand that to mean that he was asking you to go ahead with the photographs to help the

officers determine what had happened to Stephanie?

A. Yes.

Q. Were you willing to do that then?

A. Yes.

Q. Then did you voluntarily partake in the photographing process?

A. Yes.

Although Michael argues that his father was told that his family would be arrested if he didn't consent to the search, Michael does not allege that he was told anything of the sort by either his father or the police. In light of Michael's deposition testimony and the absence of any other evidence in the record suggestive of coercion, there is no material issue of genuine fact as to whether Michael validly consented to the search. The district court thus properly granted summary judgment in favor of defendants.[22]

The record does, however, create a genuine issue of material fact as to whether Cheryl, Stephen, and Shannon Crowe validly consented to their strip searches. The Escondido defendants cite deposition testimony from Michael and Shannon to support their argument that the entire Crowe family consented to

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[22] Michael additionally argues that he was too young to consent to a strip search. However, he cites no authority suggesting that a 14-year-old cannot consent to a strip search and we are aware of none.

strip searches. Specifically, they identify Michael's statement that "[my father] just told us to do the photos to help out," and Shannon's statement that "I just went along with it because I thought it would help." These two statements are not sufficient to meet the government's burden of proving that any consent from the Crowes was freely and voluntarily given, nor are they sufficient to demonstrate that a reasonable officer would have thought that the Crowes freely and voluntarily consented to the searches. The district court properly denied summary judgment.

VI. Cheryl and Stephen Crowe's Additional Fourth Amendment Claims

Cheryl and Stephen Crowe claim two further Fourth Amendment violations. First, they allege that warrants ordering them to provide blood samples were not supported by probable cause. Second, they allege that they were unlawfully detained in the Escondido police station on the day of Stephanie's murder. The district court denied summary judgment to defendants on both counts, *Crowe II,* 359 F. Supp. 2d at 1023-26, and we affirm.

A. *Blood Samples*

On February 5, 1998, Officer Claytor sought and obtained search warrants for blood samples from Cheryl and Stephen. *Crowe II,* 359 F. Supp. 2d at 1023. On February 6, 1998, Cheryl and Stephen provided blood samples pursuant to the warrants. *Id.*

The district court held that the warrants were not supported by probable cause because the evidence was sought to prove that an individual other than Cheryl or Stephen committed the crime. *Id.* at 1023-24. The district court denied qualified immunity, concluding that it was clearly established that probable cause must be particularized with respect to the person to be searched or seized. *Id.*

The Escondido defendants argue that they are entitled to qualified immunity for two reasons. First, they argue that Cheryl and Stephen consented to having their blood drawn, based on deposition testimony from Stephen in which he stated that they *would have* cooperated with a request for blood in the absence of a search warrant. This argument is unavailing because the Crowes did not give consent, they submitted to a search warrant. *Crowe II,* 359 F. Supp. 2d at 1023. Defendants cannot hide behind a consent defense when no such consent was given.

Second, the Escondido defendants argue that the district court erred in determining that the search warrants were not supported by probable cause. The affidavit in support of the warrants contained the following information:

> (1) that Stephanie Crowe had been stabbed to death in her home; (2) that Cheryl and Stephen Crowe were in the house at the time of Stephanie's death; (3) that blood analysis would tend to show that a "particular" (but unspecified) person committed the murder; and (4) that to have valid test results, all

> persons that had contact with the victim needed to be eliminated as a source of the blood.

Id. Defendants argue, as they did before the district court, that the affidavit was supported by probable cause because the blood was sought to prove that someone other than Cheryl or Stephen killed Stephanie. As the district court noted, the Supreme Court and this Court have both long held that probable cause must be particularized with respect to the person to be searched or seized. *See, e.g., Ybarra v. Illinois,* 444 U.S. 85, 91 (1979) ("Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person."); *Rise v. Oregon,* 59 F.3d 1556, 1560 (9th Cir. 1995), *overruled on other grounds by City of Indianapolis v. Edmond,* 531 U.S. 32 (2000) ("[T]he drawing of blood from free persons generally requires a warrant supported by probable cause to believe that a person has committed a criminal offense and that his blood will reveal evidence relevant to that offense. . . ."). As the district court also noted, a police officer is not entitled to qualified immunity for a search conducted pursuant to a search warrant "where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Mills v. Graves,* 930 F.2d 729, 731 (9th Cir. 1991). Under clearly established Supreme Court and Ninth Circuit law, no reasonable police officer could have believed that the desire to prove that another person (presumably

Michael) killed Stephanie established probable cause to draw Stephen and Cheryl's blood. The district court properly denied summary judgment and qualified immunity.

B. *Unlawful Detention*

The district court also properly denied summary judgment as to Cheryl and Stephen's claim that they were unlawfully detained at the Escondido police station on January 21, 1998. Cheryl and Stephen allege that when they attempted to leave the police station Detective Wrisley pulled out his gun, pointed it at Stephen's chest, and ordered Stephen and Cheryl back upstairs, where they remained until Wrisley told them that they had to go to a hotel and could not leave with Stephen's brother, as Stephen had requested. *Crowe II,* 359 F. Supp. 2d at 1026. The district court denied summary judgment on the grounds that, viewing the facts in the light most favorable to the plaintiffs, Cheryl and Stephen had been seized and defendants failed to provide any justification. *Id.* The Escondido defendants argue that Cheryl and Stephen returned upstairs voluntarily. In support of that argument, defendants cite Stephen's deposition in which he stated that *after Detective Wrisley pointed a gun at them and ordered them upstairs,* Cheryl said "let's go back upstairs" and Stephen responded "fine, let's go back upstairs." Defendants' argument is untenable. Assent in the face of an order from a police officer, emphasized with a firearm, cannot reasonably be interpreted as consent.

The district court properly denied summary judgment and qualified immunity.

VII. Conspiracy Claims

The district court granted defendants' summary judgment motion as to all conspiracy claims against defendant Blum and Fourth Amendment conspiracy claims against defendant McDonough on the grounds that neither Blum nor McDonough physically participated in the relevant arrests and searches and there was insufficient evidence to establish that they was part of a conspiracy broad enough to encompass the relevant claims. *Crowe I,* 303 F. Supp. 2d at 1064-67, 1098. We reverse the district court's decision as to Blum, and affirm as to McDonough.

To establish liability for a conspiracy in a § 1983 case, a plaintiff must "demonstrate the existence of an agreement or meeting of the minds" to violate constitutional rights. *Mendocino Envtl. Ctr. v. Mendocino County,* 192 F.3d 1283, 1301 (9th Cir. 1999) (internal quotation marks omitted). "Such an agreement need not be overt, and may be inferred on the basis of circumstantial evidence such as the actions of the defendants." *Id.* "To be liable, each participant in the conspiracy need not know the exact details of the plan, but each participant must at least share the common objective of the conspiracy." *United Steelworkers of Am. v. Phelps Dodge Corp.,* 865 F.2d 1539, 1541 (9th Cir. 1989) (en banc).

Plaintiffs' theory of liability as to Blum is that he conspired with the Escondido police and is thus liable for unconstitutional acts committed by other defendants. "A private individual may be liable under § 1983 if she conspired or entered joint action with a state actor." *Franklin v. Fox,* 312 F.3d 423, 441 (9th Cir. 2002). Establishing liability for a conspiracy between a private actor and a state actor is no different from establishing liability for a conspiracy between two state actors. The plaintiff must show "an agreement or meeting of the minds to violate constitutional rights," and "[t]o be liable, each participant in the conspiracy need not know the exact details of the plan, but each participant must at least share the common objective of the conspiracy." *Id.* (internal quotation marks omitted).

The record shows that the quality of Blum's involvement in the interrogations is not categorically inconsistent with a tacit "meeting of the minds." According to one of the detectives, Blum helped the police formulate a "tactical plan" to approach the interview. Moreover, the detectives "pretty much" followed his advice after these consultations. Insofar as these tactics and lines of questioning by the detectives shock the conscience, as demonstrated above, summary judgment in favor of Blum is unwarranted. A meeting of the minds can be inferred from circumstantial evidence, and Blum's involvement in the interrogations, particularly in formulating and directing the tactical plan, is sufficient for a reasonable factfinder to conclude it was "unlikely to have been

undertaken without an agreement," of some kind between the defendants. *Mendocino Envtl. Ctr.,* 192 F.3d at 1301. We therefore reverse the district court's grant of summary judgment on this point.

We also affirm the district court's grant of summary judgment on the Fourth Amendment conspiracy claim against McDonough. The district court concluded that although "a reasonable factfinder could find that there was a 'meeting of the minds' between defendant McDonough and the other defendants regarding the coercion of a confession from the boys," McDonough was not liable for the alleged Fourth Amendment violations because the plaintiffs did not "demonstrate that [McDonough] shared the common objective of the larger conspiracy alleged by plaintiffs: a conspiracy to wrongfully prosecute and convict the boys." *Crowe I,* 303 F. Supp. 2d at 1067. We agree. The key inquiry is whether McDonough shared a "common objective" with the Escondido police officers to falsely prosecute the boys. A "common objective" to merely prosecute the boys is insufficient; fair prosecution would not violate the boys' constitutional rights. It is too great a leap to conclude that help in obtaining a confession – even a coerced confession – suggests that McDonough shared the common objective of falsely prosecuting the boys. The district court's grant of summary judgment in favor of McDonough is affirmed as to the Fourth Amendment conspiracy claims.

VIII. Deprivation of Familial Companionship Claims

The Crowes and the Housers each alleged that their Fourteenth Amendment rights to familial companionship were violated by Michael's and Aaron's detentions. Additionally, the Crowes allege that defendants denied them their Fourteenth Amendment rights to familial companionship by placing Michael and Shannon in protective custody prior to Michael's arrest.

The district court granted summary judgment in favor of defendants as to the Crowes' and Housers' detention claims on the ground that Michael and Aaron's arrests were supported by probable cause and thus their detentions did not constitute "unwarranted governmental interference" with the families' relationships. *Crowe I,* 303 F. Supp. 2d at 1098-99; *Crowe II,* 359 F. Supp. 2d at 1039. Because Michael's and Aaron's continued detentions were wrongfully justified by their illegally coerced confessions, we reverse.

"It is well established that a parent has a fundamental liberty interest in the companionship and society of his or her child and that the state's interference with that liberty interest without due process of law is remediable under [42 U.S.C. §] 1983." *Lee v. City of Los Angeles,* 250 F.3d 668, 685 (9th Cir. 2001) (internal quotation marks omitted) (alteration in *Lee*); (*see also Smith v. City of Fontana,* 818 F.2d 1411, 1418 (9th Cir. 1987), *overruled on other grounds by Hodgers-Durgin v. de la Vina,* 199 F.3d 1037 (9th

Cir. 1999); *Kelson v. City of Springfield,* 767 F.2d 651, 654-55 (9th Cir. 1985)). "[U]nwarranted state interference" with the relationship between parent and child violates substantive due process. *Fontana,* 818 F.2d at 1418.[23]

The district court granted summary judgment against the Crowes' and Housers' claims on the ground that Michael's and Aaron's arrests were justified by probable cause. However, the lack of familial companionship that the Crowes and Housers experienced was not due, in any significant part, to the boys' arrests; it was due to the boys' incarceration. Thus, the relevant consideration is not whether the boys' were wrongfully arrested; it is whether they were wrongfully detained.

We conclude that the boys were wrongfully detained. Their coerced confessions were introduced at their *Dennis H.* hearing, where it was determined that they would remain incarcerated. However, the boys' confessions were coerced and thus not legally sufficient grounds upon which to make a pre-trial detention determination. Having conducted the interrogations, the officers were aware both that the confessions were coerced and that the confessions

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[23] Defendants argue that the correct standard is whether defendants' conduct "shocked the conscience." There is no support in the relevant case law for this assertion. The standard for deprivation of familial companionship is "unwarranted interference," not conduct which "shocks the conscience." *See Lee,* 250 F.3d at 686; *Fontana,* 818 F.2d at 1418.

could be used to keep the boys in jail. We reverse the district court's grant of summary judgment as to this claim.

The district court denied summary judgment as to the Crowes' familial companionship claim based on the placement of Michael and Shannon in protective custody on the ground that defendants failed to demonstrate that the placement was warranted under applicable California law. *Crowe II,* 359 F. Supp. 2d at 1039-40. We agree with the district court and affirm its denial.

IX. Defamation Claims

A. *Stephan*

Michael and Aaron brought state law defamation claims and § 1983 "defamation plus" claims against Deputy District Attorney Summer Stephan based on statements she made during an appearance on the news program "48 hours" shortly after the indictments against the boys were dismissed. In her motion for summary judgment, Stephan argued that the pieces of her statements that were aired were taken out of context of the interview as a whole. The interview lasted two hours and twenty minutes, and the program aired two minutes and nine seconds of that interview. *Crowe I,* 303 F. Supp. 2d at 1103. The district court examined each of the statements plaintiffs identified in their opposition to summary judgment as they were made in the context of the unedited interview and ultimately granted summary

judgment in favor of Stephan. *Id.* at 1105-1112. On appeal, Michael and Aaron argue that the district court erred because, in the context of the unedited interview, Stephan's statements imply that the boys killed Stephanie.[24]

1. State Law Defamation

California Civil Code § 44 defines "defamation" as either libel or slander. California Civil Code § 46 provides:

> Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which:
>
> 1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;
>
> 2. Imputes in him the present existence of an infectious, contagious, or loathsome disease;

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[24] As an initial matter, Stephan argues that Michael and Aaron waived their claims as to any statement not specifically discussed in the Crowe brief. This argument misses the point of the boys' argument on this issue. The boys did not claim that Stephan made several, separately actionable, defamatory statements. Rather, they claim that her statements during the interview, taken as a whole, communicate the defamatory statement that the boys killed Stephanie. The boys have not waived any portion of their defamation claims against Stephan.

> 3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;
>
> 4. Imputes to him impotence or a want of chastity; or
>
> 5. Which, by natural consequence, causes actual damage.

If a statement falls within § 46(1)-(4), it is considered defamatory per se. *See Rodriguez v. Panayiotou,* 314 F.3d 979, 983 (9th Cir. 2002). Michael and Aaron allege that Stephan's statements violated California Civil Code § 46(1) by implying that they killed Stephanie.[25]

In order to fall outside the scope of First Amendment protection, an alleged defamatory statement must "contain a provably false factual connotation." *Gilbrook v. City of Westminster,* 177 F.3d 839, 861 (9th Cir. 1999) (quoting *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 20 (1990)). Thus, in reviewing a defamation claim, a court must first ask the threshold question: "Could a reasonable factfinder conclude that the

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[25] Plaintiffs do not allege that Stephan explicitly stated that the boys killed Stephanie, nor does the transcript of the interview contain any such explicit statement.

contested statement implies an assertion of objective fact?" *Id.* at 861-62. If the answer to that question is yes, then the propriety of the district court's grant of summary judgment depends on whether Michael and Aaron created a triable issue of fact as to the falsity of Stephan's statements. *Unelko Corp. v. Rooney,* 912 F.2d 1049, 1052 (9th Cir. 1990).

We have adopted a three-part test to determine whether a reasonable factfinder could conclude that the contested statement implies an assertion of objective fact:

> First, we look at the statement in its broad context, which includes the general tenor of the entire work, the subject of the statements, the setting, and the format of the work. Next we turn to the specific context and content of the statements, analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in that particular situation. Finally, we inquire whether the statement itself is sufficiently factual to be susceptible of being proved true or false.

Gilbrook, 177 F.3d at 862 (quoting *Underwager v. Channel 9 Australia,* 69 F.3d 361, 366 (9th Cir. 1995)). Additionally, "defamatory meaning must be found, if at all, in a reading of the publication as a whole. . . . Defamation actions cannot be based on snippets taken out of context," *Kaelin v. Globe Commc'ns Corp.,* 162 F.3d 1036, 1040 (9th Cir. 1998). Stephan's statements must be analyzed in the context

of the entire interview, not just the portion the program chose to air.

During the interview, Stephan explained the evidence that had supported the prosecution of the boys, explained the decision to dismiss the indictments against the boys based on the newly discovered evidence which implicated Tuite, and repeatedly asserted that the investigation was on-going and that it remained to be seen who might ultimately be brought to trial for Stephanie's murder. Michael and Aaron identify several individual statements which they allege to be defamatory, including statements regarding the evidence which Stephan said implicated them, as well as evidence which Stephan said seemed contrary to a theory that Tuite killed Stephanie.[26]

Applying the *Underwager* three-part test to the alleged defamatory statements, a reasonable fact-finder could not conclude that Stephan implied that the boys actually did kill Stephanie. Viewed in the context of the interview as a whole, even Stephan's most questionable statements can only be interpreted as describing the evidence that led the police to investigate the boys and allowed the prosecution to continue as far as it did and expressing the facts that the investigation had not concluded and that it was still possible that either the boys or Tuite would

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[26] The specific statements are detailed in the district court opinion. *See Crowe I,* 303 F. Supp. 2d at 1105-09.

ultimately be tried for Stephanie's murder. Indeed Stephan repeatedly emphasized that it was unclear who the real perpetrator was. For example, early in the interview Stephan was asked "[D]o you believe that one day somebody, someone, some people will pay for the murder of Stephanie Crowe?" Stephan responded, "The conclusion might be that the young men will face justice. It might be that the transient will face justice. It might be that another person will face justice." Also, at the end of the interview, Stephan was asked, "Are you saying that you believe the boys did it and you just can't prove it?" Stephan responded, "I'm not saying that at all. I am saying that we have to start from the beginning. . . . the young men, the transient and maybe others out there are potential suspects in this case. We're not excluding anyone at this point." At most, Stephan implied that the boys *may* have killed Stephanie, not that they necessarily did. This expression of a possibility, particularly when juxtaposed to another mutually exclusive possibility, does not express a "provably false" fact. The district court thus properly granted summary judgment.

2. Section 1983 "Defamation-Plus" Claims

A § 1983 "defamation-plus" claim requires an allegation of injury to a plaintiff's reputation from defamation accompanied by an allegation of injury to a recognizable property or liberty interest. *Cooper,* 924 F.2d at 1532. "There are two ways to state a cognizable § 1983 claim for defamation-plus: (1) allege

that the injury to reputation was inflicted in connection with a federally protected right; or (2) allege that the injury to reputation caused the denial of a federally protected right." *Herb Hallman Chevrolet v. Nash-Holmes,* 169 F.3d 636, 645 (9th Cir. 1999).

As discussed above, Stephan's statements during the "48 Hours" interview were not defamatory as a matter of law. Thus the boys' defamation-plus claim fails as well, and the district court properly granted summary judgment. *See Cooper,* 924 F.2d at 1532.

B. *Blum*

Aaron also brought a state-law defamation and a § 1983 defamation-plus claim against Dr. Lawrence N. Blum based on statements Blum made to Escondido police officers. Detective Claytor testified in a deposition that Blum assessed Aaron as "exhibiting sociopathic tendencies." *Crowe I,* 303 F. Supp. 2d at 1112. Claytor also testified that Blum told the Escondido Police Department that "[Aaron] is a Charles Manson with an IQ." *Id.* In addition, Blum admitted in his own deposition that during a phone call with Detective Anderson on January 31, 1998, Blum stated that he thought that Aaron was a "Charlie Manson wannabe" and that he was "highly manipulative and controlling." *Id.* The district court granted summary judgment, concluding that these statements were not defamatory as a matter of law.

1. State Law Defamation

Aaron argues that the district court erred because the statements implied that Aaron participated in Stephanie's murder and thus constitute defamation per se under California Civil Code § 46(1). First, the statements regarding Aaron "exhibiting sociopathic tendencies" and being "highly manipulative and controlling" cannot constitute defamation per se under California Civil Code § 46(1) because they do not charge Aaron with a crime. Rather, they are statements regarding Aaron's psychological profile. While they may – or may not – be provably false, they do not constitute defamation per se, Aaron would have to allege actual damage to maintain a defamation allegation. *See* Cal. Civil Code § 46(5). As Aaron has made no such allegation, his defamation claim as to these two statements necessarily fails.

Aaron's defamation claim based on the Charles Manson comparison also fails. First, the statement is "the type of colorful, figurative rhetoric that reasonable minds would not take to be factual." *Gilbrook*, 177 F.3d at 862 (reference to plaintiff as a "Jimmy Hoffa" not actionable); *see also Underwager*, 69 F.3d at 367 (statement that plaintiff is "intrinsically evil" not actionable because not capable of verification). Second, in the context in which it was given – a statement to police by a psychologist contracted to observe police interrogations – the statement can most reasonably be interpreted as a commentary on Aaron's psychological profile, as opposed to an assertion that he committed a particular crime. The district court

properly granted summary judgment in favor of Blum.

2. Section 1983 "Defamation-Plus" Claim

Aaron's defamation-plus claim fails because Blum's statements were not defamatory as a matter of law. The district court properly granted summary judgment as to this claim as well. *See Cooper,* 924 F.2d at 1532.

X. Municipal Liability Claims

In their complaint, plaintiffs assert causes of action against the City of Escondido and the City of Oceanside under *Monell v. Department of Social Services,* 436 U.S. 658 (1978). Because the district court held that McDonough – the only Oceanside police officer named in the suit – was entitled to summary judgment with respect to all of plaintiffs' claims, the district court determined that the City of Oceanside was also entitled to summary judgment on plaintiffs' *Monell* claims. *Crowe I,* 303 F. Supp. 2d at 1115. Similarly, the district court granted summary judgment with respect to the *Monell* claims against the City of Escondido which were predicated on the alleged Fifth Amendment violations. *Id.*; *see also Los Angeles v. Heller,* 475 U.S. 796, 799 (1986) ("[N]either *Monell* . . . nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact

the jury has concluded that the officer inflicted no constitutional harm.").

Because we hold that the officers did inflict constitutional harm, we consider the *Monell* claim. *Monell* held that "[l]ocal governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." 436 U.S. at 690. A municipality is not liable for all constitutional torts committed by its employees, however: "[A] municipality cannot be held liable solely because it employs a tortfeasor – or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory." *Id.* at 691. The constitutional tort must have been committed "pursuant to official municipal policy." *Id.*

On appeal, plaintiffs allege their *Monell* claim on the basis of statements made by Escondido and Oceanside officials that McDonough, Claytor, and Wrisley complied with Escondido's and Oceanside's policies and procedures. However, *Monell* is clear that the constitutional tort must follow from "official municipal policy." Plaintiffs do not allege that Escondido or Oceanside municipal policy permits or encourages the practice of coercing confessions. Therefore, the *Monell* claims fail.

XI. Conclusion

We reverse the district court's grant of summary judgment as to: (1) Michael and Aaron's Fifth Amendment claims; (2) Michael and Aaron's Fourteenth Amendment substantive due process claims; (3) all otherwise surviving claims against McDonough; (4) all otherwise surviving claims against Blum; (5) the Crowes' deprivation of familial companionship claim based on Michael's detention; and (6) the Housers' deprivation of familial companionship claim based on Aaron's detention. We affirm the district court's grant of summary judgment as to: (1) Aaron's Fourth Amendment claim that police lacked probable cause to arrest him; (2) Michael's Fourth Amendment claim that police lacked probable cause to arrest him; (3) Michael's claim that police violated his Fourth Amendment rights by strip searching him; (4) Aaron's Fourth Amendment claim that the warrants authorizing the search of his home were not supported by sufficient probable cause; (5) the conspiracy claims against McDonough; (6) Michael and Aaron's defamation claims against Stephan; (7) Aaron's defamation claim against Blum; and (8) all claims against the Cities of Escondido and Oceanside. Additionally, we affirm the district court's denial of summary judgment as to: (1) Cheryl, Stephen, and Shannon Crowes' claims that police violated his Fourth Amendment rights by strip searching them; (2) Cheryl and Stephen's Fourth Amendment claims that the warrant authorizing police to draw blood samples was not supported by probable cause; (3) Cheryl and Stephen's

Fourth Amendment claims of wrongful detention; and (4) the Crowes' deprivation of familial companionship claims based on the placement of Michael and Shannon in protective custody. We remand to the district court for further proceedings consistent with this opinion.

Each party shall bear their own costs on appeal.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

Volume 1 of 2

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

MICHAEL CROWE; STEPHEN CROWE; CHERYL A. CROWE; JUDITH ANN KENNEDY; SHANNON CROWE, a minor, through guardian ad litem STEPHAN CROWE; ZACHARY TREADWAY; JOSHUA DAVID TREADWAY; MICHAEL LEE TREADWAY; TAMMY TREADWAY; JANET HASKELL; MARGARET SUSAN HOUSER; CHRISTINE HUFF; GREGG HOUSER; AARON HOUSER,

Plaintiffs-Appellees,

v.

COUNTY OF SAN DIEGO; THE CITY OF OCEANSIDE; CHRIS MCDONOUGH; GARY HOOVER; SUMMER STEPHAN; LAWRENCE BLUM; CITY OF ESCONDIDO; NATIONAL INSTITUTE FOR TRUTH VERIFICATION; RICK BASS,

Defendants,

and

MARK WRISLEY; BARRY SWEENEY; RALPH CLAYTOR; PHIL ANDERSON,

Defendants-Appellants.

No. 05-55467

D.C. No.
CV-99-00241-JSR

MICHAEL CROWE; STEPHEN CROWE; CHERYL A. CROWE,

Plaintiffs-Appellants,

SHANNON CROWE, a minor, through guardian ad litem, STEPHAN CROWE,

Plaintiff-Appellant,

and

JUDITH ANN KENNEDY,

Plaintiff,

ZACHARY TREADWAY; JOSHUA DAVID TREADWAY; MICHAEL LEE TREADWAY; TAMMY TREADWAY; JANET HASKELL; MARGARET SUSAN HOUSER; CHRISTINE HUFF; GREGG HOUSER; AARON HOUSER,

Plaintiffs,

v.

COUNTY OF SAN DIEGO; THE CITY OF OCEANSIDE; CHRIS MCDONOUGH; GARY HOOVER; SUMMER STEPHAN; LAWRENCE BLUM; CITY OF ESCONDIDO; NATIONAL INSTITUTE FOR TRUTH VERIFICATION; RICK BASS,

Defendants,

and

MARK WRISLEY; BARRY SWEENEY; RALPH CLAYTOR; PHIL ANDERSON,

Defendants-Appellees.

No. 05-55542
D.C. No.
CV-99-00241-JSR

STEPHEN CROWE; CHERYL CROWE; JUDITH ANN KENNEDY; SHANNON CROWE, a minor through their guardian ad litem, STEPHEN CROWE; ZACHARY TREADWAY; JOSHUA DAVID TREADWAY; MICHAEL LEE TREADWAY; TAMMY TREADWAY; JANET HASKELL,

Plaintiffs,

CHRISTINE HUFF,

Plaintiff,

and

MARGARET SUSAN HOUSER; GREGG HOUSER; AARON HOUSER,

Plaintiffs-Appellants,

v.

COUNTY OF SAN DIEGO; MARK WRISLEY; BARRY SWEENEY; RALPH CLAYTOR; CITY OF ESCONDIDO; PHILLIP ANDERSON; SUMMER STEPHAN; RICK BASS, Lieutenant,

Defendants-Appellees.

No. 05-56311

D.C. No. CV-99-00241-JSR

MICHAEL CROWE; STEPHEN CROWE; CHERYL A. CROWE; JUDITH ANN KENNEDY; SHANNON CROWE, a minor, through guardian ad litem STEPHEN CROWE,

Plaintiffs-Appellants,

and

ZACHARY TREADWAY; JOSHUA DAVID TREADWAY; MICHAEL LEE TREADWAY; TAMMY TREADWAY; JANET HASKELL; MARGARET SUSAN HOUSER; CHRISTINE HUFF; GREGG HOUSER; AARON HOUSER,

Plaintiffs,

v.

COUNTY OF SAN DIEGO; THE CITY OF OCEANSIDE; CHRIS MCDONOUGH; GARY HOOVER; SUMMER STEPHAN; LAWRENCE BLUM; CITY OF ESCONDIDO; NATIONAL INSTITUTE FOR TRUTH VERIFICATION; RICK BASS; MARK WRISLEY; BARRY SWEENEY; RALPH CLAYTOR; PHIL ANDERSON,

Defendants-Appellees.

No. 05-56362

D.C. No. CV-99-00241-JSR

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Southern District of California
John S. Rhoades, District Judge, Presiding

Argued and Submitted
June 1, 2008 – Pasadena, California

Filed January 14, 2010.
Amended January 27, 2010.

Before: Stephen S. Trott, Sidney R. Thomas, and Raymond C. Fisher, Circuit Judges.

Opinion by Judge Thomas

COUNSEL

Milton J. Silverman (argued), Robert T. Geile, Law Office of Milton J. Silverman; attorneys for plaintiffs-appellants and Cross-Appellees Michael Crowe, Stephen Crowe, Cheryl Crowe, and Shannon Crowe.

Jon R. Williams (argued), Lindsay J. Reese, Ross, Dixon & Bell; Dennis A. Schoville, Louis G. Arnell, James S. Iagmin, Schoville & Arnell; attorneys for plaintiffs-appellants and cross-appellees Aaron Houser, Margaret Susan Houser, and Gregg Houser.

John J. Sansone, County Counsel, County of San Diego, George W. Brewster Jr. (argued), Senior Deputy; attorneys for defendant-appellant Summer Stephan.

Richard J. Schneider, Glnar J. Fozi, Daley & Heft; Steven J. Renick (argued), Manning & Marder, Kass Ellrod, Ramirez; attorneys for defendants-appellees

and Cross-Appellants City of Escondido, Mark Wrisley, Barry Sweeney, Ralph Claytor, and Phil Anderson.

Diana L. Field, Ferguson, Praet & Sherman; Timothy T. Coates, Cynthia T. Tobisman, Greines, Martin, Stein & Richland; attorneys for defendants-appellees and cross-appellants City of Oceanside, Oceanside Police Department, and Christopher McDonough.

Kenneth H. Moreno, Scott J. Loeding, Murchinson & Cumming; attorneys for defendant-appellee Lawrence N. Blum, Ph.D.

ORDER

The opinion filed on January 14, 2010, is hereby amended as follows. The paragraph beginning at the bottom of Slip. Op. page 1115 and continuing onto page 1116 is to be deleted and the following inserted.

We reverse the district court's grant of summary judgment as to: (1) Michael and Aaron's Fifth Amendment claims; (2) Michael and Aaron's Fourteenth Amendment substantive due process claims; (3) all otherwise surviving Fourth Amendment claims against McDonough; (4) all otherwise surviving claims against Blum; (5) the Crowes' deprivation of familial companionship claim based on Michael's detention; (6) the Housers' deprivation of familial companionship claim based on Aaron's detention; and (7) all otherwise surviving claims against the Cities of Escondido and Oceanside. We affirm the district

court's grant of summary judgment as to: (1) Aaron's Fourth Amendment claim that police lacked probable cause to arrest him; (2) Michael's Fourth Amendment claim that police lacked probable cause to arrest him; (3) Michael's claim that police violated his Fourth Amendment rights by strip searching him; (4) Aaron's Fourth Amendment claim that the warrants authorizing the search of his home were not supported by sufficient probable cause; (5) the conspiracy claims against McDonough; (6) Michael and Aaron's defamation claims against Stephan; and (7) Aaron's defamation claim against Blum. Additionally, we affirm the district court's denial of summary judgment as to: (1) Cheryl, Stephen, and Shannon Crowes' claims that police violated his Fourth Amendment rights by strip searching them; (2) Cheryl and Stephen's Fourth Amendment claims that the warrant authorizing police to draw blood samples was not supported by probable cause; (3) Cheryl and Stephen's Fourth Amendment claims of wrongful detention; and (4) the Crowes' deprivation of familial companionship claims based on the placement of Michael and Shannon in protective custody. We remand to the district court for further proceedings consistent with this opinion.

Each party shall bear their own costs on appeal.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

Michael CROWE, et al., Plaintiffs,

v.

COUNTY OF SAN DIEGO, et al., Defendants.

And Related Actions

No. 99CV0241 R (RBB).

United States District Court,
S.D. California.

Feb. 28, 2005.

Milton J. Silverman, JR., Law Offices of Milton Silverman, Robert J. Francavilla, Casey Gerry Reed and Schenk, Dennis A. Schoville, Schoville and Arnell, San Diego, CA, for Plaintiffs.

Guylyn Remmenga Cummins, Sheppard Mullin Richter and Hampton, San Diego, CA, for Intervenor.

Deborah Lynn Nash, George W. Brewster, JR., County of San Diego Office of County Counsel, Kenneth H. Moreno, Murchison and Cumming, Luther W. Horton, Horton and Ryan, San Diego, CA, Diana L. Field, Ferguson Praet and Sherman, Santa Ana, CA, Mark A. Waggoner, City of Escondido Office of the City Attorney, Escondido, CA, Richard J. Schneider, Daley and Heft, Solana Beach, CA, Hugh G. Radigan, Koester and Walker, Glendale, CA, for Defendants.

ORDER RE: SUMMARY JUDGMENT MOTIONS

RHOADES, District Judge.

INTRODUCTION

The tragic facts of this case arise out of the murder of young Stephanie Crowe in her home on the evening of January 20, 1998, and the ensuing investigation. Stephanie's murder was investigated by members of the Escondido Police Department, including defendants Mark Wrisley, Ralph Claytor, Barry Sweeney, and Phil Anderson (collectively, "defendants"), who bring the present motions for summary judgment. The investigation of Stephanie's death initially led to the arrest and indictment of Stephanie's brother, Michael Crowe, and his two friends, Joshua Treadway and Aaron Houser (collectively, "the boys"), all juveniles at the time. Prior to the boys' trial, evidence was discovered which resulted in the District Attorney dropping the charges against the boys without prejudice. The boys and their families then brought this civil action for damages for violation of their federal constitutional rights pursuant to 42 U.S.C. § 1983 as well as for violation of state law. This court previously entered summary judgment on many of plaintiffs' claims. *See Crowe v. County of San Diego,* 303 F.Supp.2d 1050 (S.D.Cal.2004). Subsequent to the entry of that order, Richard Tuite was convicted of Stephanie's murder. This court is now confronted with a second round of motions for summary judgment filed by defendants Wrisley, Claytor, Sweeney and Anderson as to claims brought by Michael, his sister, Shannon, his parents, Cheryl and Stephen Crowe, and his grandmother, Judith Kennedy (collectively, "plaintiffs").

FACTUAL BACKGROUND

To provide context to this order, the court provides a brief account of the relevant facts. A more thorough presentation of the relevant factual background can be found in *Crowe*, 303 F.Supp.2d at 1058-1062.

On the night of January 20, 1998, the police received phone calls that Tuite, a transient, was bothering people in the vicinity of the Crowe residence. Tuite appeared drunk or high. One witness heard Tuite yell "I'm going to kill you you fucking bitch." Another witness saw Tuite spinning around in circles.

Between 7:00 and 8:00 p.m. that night, Tuite entered one house after the occupant, Dannette Mogelinski, mistaking his knock for that of a neighbor, invited him in. Tuite repeatedly asked for Tracy. Mogelinski said she did not know Tracy. Tuite left but then opened the door and again asked for Tracy. Mogelinski again said she did not know Tracy, and Tuite left.

Around 9:28 p.m., Gary West, a neighbor of the Crowes, called police to report a transient who had knocked on his door and said he was looking for a girl. Escondido police officer Scott Walters, not a defendant in this action, was dispatched to the area. While investigating this call, Officer Walters drove up to the Crowe house. As he drove up, the door next to the garage door closed. He couldn't see who closed it.

Officer Walters left the Crowe house and indicated in his log that the transient was "gone on arrival."

Stephanie was found dead by Judith Kennedy around 6:30 a.m. on January 21, 1998. An autopsy determined that Stephanie was stabbed numerous times with a knife with a 5-6 inch blade. Police questioned all of the members of the Crowe household on January 21, 1998. Michael was questioned several times.

On January 22, 1998, Escondido Police Detectives Lanigan and Naranjo, not defendants in this case, went to the Treadway residence to speak with Joshua. The detectives saw a knife in plain view on top of a couch in the living room.

Michael was arrested for Stephanie's murder on January 23, 1998.

On January 26, 1998 Detective Han obtained a search warrant for the Treadway residence. Probable cause for the warrant was predicated upon the fact that Michael had been arrested for the murder, Michael had stated that Joshua was his best friend, Michael had called Joshua from the police station on the morning of the murder, and a knife meeting the description of the murder weapon had been seen at the Treadway residence.

On January 27, 1998, prior to the execution of the search warrant for the Treadway residence, Aaron's mother alerted police to the fact that a knife with a 4-5 inch blade which belonged to her son was

missing from his collection. Based on this information, Detective Han sought and obtained a warrant to search the Houser residence. Defendants also questioned Aaron that same day.

The warrants for the Treadway and Houser residences were executed on the evening of January 27, 1998. While the warrant for the Treadway residence was being executed, Joshua was being questioned by police. During his questioning, the search of the Treadway residence revealed two knives under his bed. One had a 5 1/2 inch blade, and the other had a 6 inch blade. Joshua was then arrested for stealing Aaron's knife. After being read his *Miranda* rights, Joshua admitted taking the knife from Aaron, but denied any involvement in Stephanie's death. However, over the course of further questioning, Joshua changed his story. He told defendants that he had gotten the knife from Aaron and that Aaron had told him it was the knife used to kill Stephanie. Joshua was allowed to go home after the questioning.

Joshua was questioned again on February 10, 1998. This time, Joshua gave what appeared to be a detailed account of the events leading up to the murder and stated that he had acted as a lookout while Aaron and Michael committed the murder. Joshua's confession, which was ruled voluntary by the state court trial judge, suggested that Michael killed Stephanie because he did not like her. At some point

during the questioning, Joshua was arrested for Stephanie's murder.[1]

On the morning of February 11, 1998, defendant Claytor obtained search warrants for Aaron's residence and school locker. Those warrants were executed on the morning of February 11 by defendants Sweeney and Anderson.

Aaron was arrested on February 11, 1998, and questioned for a second time. Aaron did not admit involvement in Stephanie's murder. However, during this questioning, Aaron explained how he would kill Stephanie if he was going to kill her.[2]

In late May 1998, the grand jury issued indictments against the boys. Prior to the boys' trial, drops of Stephanie's blood were found on Tuite's sweatshirt. The charges against the boys were dismissed without prejudice, and this action followed.

ANALYSIS

I. The General Law of Qualified Immunity

Because the resolution of the current motions hinges in large part on the proper application of the doctrine of qualified immunity, the court begins by

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[1] For a more detailed account of Joshua's interrogations, *see Crowe*, 303 F.Supp.2d at 1060-61.

[2] For a more detailed account of Aaron's interrogations, *see Crowe*, 303 F.Supp.2d at 1059-61.

setting forth the relevant law regarding the general application of that doctrine.

Qualified immunity is immunity from suit, not simply immunity from liability. *Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). Thus, it must be determined at the earliest possible stage of the litigation. *Hunter v. Bryant,* 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) (*per curiam*). The requirement that qualified immunity be determined at the earliest possible stage of the litigation "calls upon courts, not juries, to settle the ultimate questions of qualified immunity." *Johnson v. County of Los Angeles,* 340 F.3d 787, 791 (9th Cir.2003); *see also Lindsey v. Shalmy,* 29 F.3d 1382, 1384 (9th Cir.1994) ("The question of immunity is not to be 'routinely place[d] . . . in the hands of the jury.' ") (quoting *Hunter,* 502 U.S. at 227, 112 S.Ct. 534). Otherwise, qualified immunity would rarely be decided until after trial, which defeats the purpose of having qualified immunity from suit.

Whether a defendant is entitled to qualified immunity is a two-part inquiry. The first step is to ask: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). In *Saucier,* the Supreme Court disapproved of the Ninth Circuit's former practice of denying summary judgment "any time a material issue of fact remains" because such a practice "could undermine the goal of qualified immunity

to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.'" *Saucier,* 533 U.S. at 202, 121 S.Ct. 2151 (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)).

As the First Circuit noted in *Riverdale Mills Corp. v. Pimpare,* 392 F.3d 55, 61-62 (1st Cir.2004), given that *Saucier* involved a motion for summary judgment, the Court in *Saucier* created an ambiguity regarding a plaintiff's evidentiary burden when qualified immunity is raised in the summary judgment context by stating that courts must "determine whether, *on the facts alleged,* a constitutional violation could be found. . . ." *Saucier,* 533 U.S. at 207, 121 S.Ct. 2151. However, like the First Circuit, this court concludes that the Supreme Court in *Saucier* did not intend by its choice of language to nullify Fed.R.Civ.P. 56(c)[3] and (e)[4] and overrule its well-established precedent interpreting Rule 56 as requiring a plaintiff to

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[3] Rule 56(c) provides in relevant part that "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

[4] Rule 56(e) provides in relevant part that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denial of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

come forward with sufficient *evidence* in the form of depositions, answers to interrogatories, admissions on file and affidavits from which a factfinder at trial could rule in the plaintiff's favor. *See First Nat. Bank of Ariz. v. Cities Serv. Co.,* 391 U.S. 253, 289, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968) ("What Rule 56(e) does make clear is that a party cannot rest on the allegations contained in his complaint in opposition to a properly supported summary judgment motion made against him."); *see also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) ("[T]here is no issue for trial unless there is sufficient *evidence* favoring the nonmoving party for a jury to return a verdict for that party.") (emphasis added); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) ("In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.").

First, other portions of *Saucier* are written in such a way as to suggest that the Court did not intend to dispense with the requirements of Rule 56 in the context of a qualified immunity analysis brought at the summary judgment stage. For example, the Court states that "if a violation could be made out on a favorable view *of the parties' submissions,* the next, sequential step is to ask whether the right

was clearly established." *Saucier,* 533 U.S. at 201, 121 S.Ct. 2151 (emphasis added); *see also Saucier,* 533 U.S. at 211, 121 S.Ct. 2151 ("I agree that Katz's submissions were too slim to put officer Saucier to the burden of trial.") (Ginsburg, J., concurring in the judgment). Second, it is difficult to conclude that the Supreme Court, if it intended to overrule its earlier and well-established precedent regarding a plaintiff's summary judgment burden, would do so tacitly in a case where the issue was never raised. Finally, as the First Circuit explained, "[s]ubsequent Supreme Court cases have clarified, implicitly if not explicitly, that courts assessing the first prong at summary judgment should look beyond the complaint to the broader summary judgment record." *Riverdale Mills Corp.,* 392 F.3d at 62 (citing *Groh v. Ramirez,* 540 U.S. 551, ___, 124 S.Ct. 1284, 1293, 157 L.Ed.2d 1068 (2004) and *Hope v. Pelzer,* 536 U.S. 730, 734 n. 1, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002)). For example, in *Groh,* the Supreme Court, in determining whether the defendants had violated the plaintiff's rights in the context of a motion for summary judgment on qualified immunity grounds, explained that "'*[t]he evidence* of the nonmovant is to be believed, and all justifiable inferences are to be drawn in [her] favor.'" *Groh,* 540 U.S. at 562, 124 S.Ct. 1284 (quoting *Anderson v. Liberty Lobby,* 477 U.S. at 255, 106 S.Ct. 2505) (emphasis added). For these reasons, this court will construe the facts here in the light most favorable to plaintiffs only to the extent that the facts alleged by plaintiffs are supported by evidence of record as

required by Rule 56(c) and (e) and Supreme Court case law interpreting these summary judgment rules.

If, construing the evidentiary record in the light most favorable to the plaintiff, a court concludes that the plaintiff's rights were violated, then the court must proceed to the second step of the qualified immunity analysis, pursuant to which the officer is entitled to qualified immunity if the law was not "clearly established," *i.e.,* if it would not have been clear to a reasonable officer that his conduct was unlawful under the circumstances. *Saucier,* 533 U.S. at 202, 121 S.Ct. 2151. "Whether the law was clearly established is a pure question of law for the court to decide." *Carnell v. Grimm,* 74 F.3d 977, 978 (9th Cir.1996). The clearly-established inquiry, "it is vital to note, must be undertaken in light of the specific context of the case, *not as a broad general proposition. . . .*" *Saucier,* 533 U.S. at 201, 121 S.Ct. 2151 (emphasis added). Thus, "[t]he relevant, dispositive inquiry" is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202, 121 S.Ct. 2151. "If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Id.*

It is important to note that courts of appeal have been tempted to meld the two prongs of the qualified immunity test, particularly in the Fourth Amendment context. The argument is that it is inappropriate to give qualified immunity to officials who have violated the Fourth Amendment by unreasonably

searching or seizing because qualified immunity is intended to protect reasonable official action. In other words, the argument is that "[i]t is not possible . . . to say that one 'reasonably' acted unreasonably." *Anderson v. Creighton,* 483 U.S. 635, 643, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). However, such an argument has been squarely rejected by the Supreme Court. *See id.; Saucier,* 533 U.S. at 203-04, 121 S.Ct. 2151.

Most recently, in *Brosseau v. Haugen,* ___ U.S. ___, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (*per curiam*), the Supreme Court reversed the Ninth Circuit's opinion denying qualified immunity to an officer who shot a fleeing suspect in the back. The Court criticized the Ninth Circuit for finding that the law was clearly established based on the very general test of *Graham v. Connor* that "use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness." *Brosseau,* ___ U.S. at ___, 125 S.Ct. at 599. The Court explained that although such a general test may "in an obvious case" clearly establish that an officer's conduct was unlawful, such a general standard is not sufficient to clearly establish the law where the case is not one involving run-of-the-mill facts. *Id.* The Court went on to consider the "handful of cases relevant to the 'situation [Brosseau] confronted': whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight." *Id.* at ___, 125 S.Ct. at 600. The Court concluded that the "cases taken together undoubtedly show that this area is one in

which the result depends very much on the facts of each case." *Id.* Noting that none of the cases squarely governed but did suggest that Brosseau's actions "fell in the 'hazy border between excessive and acceptable force,'" the Court concluded that these cases did not "clearly establish" that Brosseau's act of shooting the plaintiff in the back violated the Fourth Amendment. *Brosseau,* ___ U.S. at ___, 125 S.Ct. at 600 (quoting *Saucier,* 533 U.S. at 206, 121 S.Ct. 2151).

Keeping in mind this analytical framework, the court now turns to the claims that are the subject of defendants' motions.

II. First Claim for Relief – Violation of the Fourth Amendment

Michael's Arrest

Michael contends that defendants violated his Fourth Amendment right to be free of unreasonable seizures by arresting him without probable cause.[5] *See Beck v. Ohio,* 379 U.S. 89, 90-91, 85 S.Ct. 223, 13

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[5] Although defendants, apparently out of an abundance of caution, address the constitutionality of Michael's placement at the Polinsky Children's Center under the Fourth Amendment, the court does not address this argument, because a review of the complaint and Michael's opposition to the motion suggests that Michael is not pursuing a Fourth Amendment claim predicated upon his placement at the Polinsky Children's Center. However, in section V, *infra,* the court addresses Michael's Fourteenth Amendment challenge to his placement there.

L.Ed.2d 142 (1964) (holding that the Fourth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, prohibits arrests without probable cause); *McKenzie v. Lamb,* 738 F.2d 1005, 1007 (9th Cir.1984) (explaining that arrests without probable cause give rise to a § 1983 damages action). Defendants seek summary judgment on the merits as well as on qualified immunity grounds.

A. An Issue for the Court

As set forth in section I, *supra,* in determining whether defendants are entitled to qualified immunity, the court must necessarily address the merits of Michael's claim. *See Brosseau,* ___ U.S. at ___, 125 S.Ct. at 598 ("When confronted with a claim of qualified immunity, a court must ask first the following question: 'Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?'") (quoting *Saucier,* 533 U.S. at 201, 121 S.Ct. 2151). Thus, although the question of whether there was probable cause to arrest is generally an issue for the jury in the context of a § 1983 action, *see McKenzie,* 738 F.2d at 1008, where, as here, a defendant seeks summary judgment based on the doctrine of qualified immunity, the existence of probable cause is necessarily an issue for the court. *See Saucier,* 533 U.S. at 207, 121 S.Ct. 2151 (instructing "district courts and courts of appeals to concentrate at the outset on the definition of the constitutional right and to determine

whether . . . a constitutional violation could be found"). Again, this is because qualified immunity is immunity from suit, not simply immunity from liability, *see Mitchell,* 472 U.S. at 526, 105 S.Ct. 2806, and therefore it must be determined at the earliest possible stage of the litigation. *Hunter,* 502 U.S. at 227, 112 S.Ct. 534.

Thus, the initial issue this court must ask and answer in order to determine whether defendants are entitled to summary judgment on qualified immunity grounds with respect to Michael's Fourth Amendment claim is whether, considering all of the evidence presented on summary judgment in the light most favorable to Michael, there was probable cause for his arrest.

B. Standard for Determining Probable Cause

A warrantless arrest must be supported by probable cause. *See United States v. Bueno-Vargas,* 383 F.3d 1104, 1107 (9th Cir.2004). "The long-prevailing standard of probable cause protects 'citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime,' while giving 'fair leeway for enforcing law in the community's protection.'" *Maryland v. Pringle,* 540 U.S. 366, 370, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003) (quoting *Brinegar v. United States,* 338 U.S. 160, 176, 69 S.Ct.

1302, 93 L.Ed. 1879 (1949)). For purposes of the Fourth Amendment,[6] "[p]robable cause exists when, under the totality of the circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability that [the suspect] had committed a crime." *Peng v. Mei Chin Penghu,* 335 F.3d 970, 976 (9th Cir.2003) (quoting *United States v. Buckner,* 179 F.3d 834, 837 (9th Cir.1999) (citations and quotations omitted)). In other words, "[a]rresting officers have probable cause to make warrantless arrests if, *at the moment of arrest,* facts and circumstances within their knowledge and of which they have reasonably trustworthy information are sufficient to warrant a prudent man in believing that the arrested person had committed or

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[6] The standard for a warrantless arrest under California law has been stated slightly differently in some cases. For example, the Ninth Circuit, citing California case law, has stated that "[u]nder California law, an officer has probable cause for a warrantless arrest 'if the facts known to him would lead a [person] of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime.'" *Peng v. Mei Chin Penghu,* 335 F.3d 970, 976 (9th Cir.2003) (quoting *People v. Adams,* 175 Cal.App.3d 855, 221 Cal.Rptr. 298, 301 (1985) (citation and quotations omitted)). However, other California cases have set forth the standard in language identical to the Fourth Amendment standard in all relevant respects. *See People v. Talley,* 65 Cal.2d 830, 835, 56 Cal.Rptr. 492, 423 P.2d 564 (1967) ("Reasonable or probable cause exists when the facts and circumstances within the knowledge of the officers at the moment of the arrest are sufficient to warrant a prudent man in believing that the defendant has committed an offense.").

was committing an offense." *United States v. Hillison,* 733 F.2d 692, 697 (9th Cir.1984) (emphasis added).

Michael contends that in determining whether his warrantless arrest is supported by probable cause, the court is confined to considering the facts set forth in the declaration of probable cause that was filed with the state court in support of Michael's arrest as required by California law. It is well-established that "[t]he validity of a *search warrant* depends upon the sufficiency of what is found within the four corners of the underlying affidavit." *United States v. Taylor,* 716 F.2d 701, 705 (9th Cir.1983) (emphasis added); *see also United States v. Rubio,* 727 F.2d 786, 795 (9th Cir.1983); *United States v. Martinez,* 588 F.2d 1227, 1234 (9th Cir.1978); *United States v. Anderson,* 453 F.2d 174, 177 (9th Cir.1971). Moreover, in *United States v. Castillo,* 866 F.2d 1071 (9th Cir.1988), the Ninth Circuit applied the "four corners" rule where a defendant challenged a magistrate judge's determination that there was probable cause to issue *an arrest warrant.* However, the parties have failed to cite, and the court's own research has failed to reveal, a case holding that for purposes of determining whether *a warrantless arrest* violated the Fourth Amendment, a court is confined to considering the facts in a declaration of probable cause.

None of the cases Michael cites for this proposition – *People v. Privett,* 55 Cal.2d 698, 12 Cal.Rptr. 874, 361 P.2d 602 (1961), *People v. Talley,* 65 Cal.2d 830, 56 Cal.Rptr. 492, 423 P.2d 564 (1967) or *Beck v. Ohio,* 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142

(1964) – so hold. To the contrary, these cases are authority for the proposition that "[w]hen the constitutional validity of an arrest is challenged, it is the function of a court to determine whether the facts *available to the officers at the moment of the arrest* would 'warrant a man of reasonable caution in the belief' that an offense has been committed." *Beck,* 379 U.S. at 96, 85 S.Ct. 223 (quoting *Carroll v. United States,* 267 U.S. 132, 162, 45 S.Ct. 280, 69 L.Ed. 543 (1925)) (emphasis added); *see also Privett,* 55 Cal.2d at 701, 12 Cal.Rptr. 874, 361 P.2d 602 ("The question of probable cause to justify the arrest of Edwards and the search of the premises incident thereto must be tested upon the facts which the record shows were known to the officers at the time the arrest was made."); *Talley,* 65 Cal.2d at 835, 56 Cal.Rptr. 492, 423 P.2d 564 ("The question of probable cause to justify an arrest without a warrant must be tested by the facts which the record shows were known to the officers at the time the arrest was made."). Although *Privett* and *Talley* refer to the need to consider the facts "which the record shows were known to the officers," neither case mentions a declaration of probable cause, and nothing in either case suggests that "the record" in that case consisted of a declaration of probable cause.

Moreover, the court has been unable to find a single case in which the Ninth Circuit has confined its probable cause analysis to the four corners of a probable cause declaration when evaluating the constitutionality of a warrantless arrest. Rather, the

Ninth Circuit has consistently evaluated the legality of warrantless arrests by considering all of the facts *known to the officers at the time of the arrest. See United States v. Martin,* 509 F.2d 1211, 1213 (9th Cir.1975) (explaining that in determining whether a warrantless arrest is supported by probable cause, a court "must consider *all the facts known to the officers* and consider *all the reasonable inferences that could be drawn by them before the arrest*") (emphasis added); *United States v. Bernard,* 623 F.2d 551, 559 (9th Cir.1980) (citing *Martin*); *Hillison,* 733 F.2d at 697 ("Arresting officers have probable cause to make warrantless arrests if, at the moment of arrest, facts and circumstances within their knowledge and of which they have reasonably trustworthy information are sufficient to warrant a prudent man in believing that the arrested person had committed or was committing an offense."). The conclusion that a probable cause determination is not confined to the four corners of the declaration of probable cause is further supported by the fact that the Ninth Circuit has specifically considered such factors as the officer's experience and expertise and the knowledge and testimony of other officers at the scene in determining whether a warrantless arrest is supported by probable cause. *See Hillison,* 733 F.2d at 697 (explaining that in considering whether there was probable cause to make a warrantless arrest, "the court properly could take into account the experience and expertise of Drug Enforcement Administration agents observing" the defendant's activity); *United States v. Del Vizo,* 918 F.2d 821, 826 (9th Cir.1990) (explaining that

in evaluating probable cause for a warrantless arrest, "[w]hen there has been communication among agents, probable cause can rest upon the investigating agents' 'collective knowledge' ") (quoting *Bernard,* 623 F.2d at 560-61); *see also United States v. Valencia,* 24 F.3d 1106, 1108 (9th Cir.1994) (quoting *Del Vizo*). Thus, the probable cause analysis here will not be confined to the facts set forth in the declaration for probable cause that was executed in support of Michael's arrest.

C. No Fourth Amendment Violation

The court concludes that defendants had probable cause to arrest Michael, and therefore did not violate the Fourth Amendment by arresting him, given all of the information in defendants' possession at the time of the arrest (including information regarding the time of Stephanie's death and the position and state of Stephanie's body, Michael's statements regarding seeing Stephanie's door closed at 4:30 a.m., and the state of the windows and doors) and considering all of the reasonable inferences that could be drawn from those facts. *See Martin,* 509 F.2d at 1213 (explaining that in determining whether a warrantless arrest is supported by probable cause, a court "must consider all the facts known to the officers *and consider all the reasonable inferences that could be drawn by them* before the arrest") (emphasis added). Although in determining the facts in defendants' possession the court construes the evidence in the light most favorable to Michael, in determining

the reasonable inferences that could be drawn from those facts, the court need not accept only the inferences posited by Michael because the court must consider "all the reasonable inferences" that could be drawn from the facts. *See id.* As the First Circuit has explained, "the availability of alternative inferences does not prevent a finding of probable cause so long as the inference upon which the officer relies is reasonable." *Cox v. Hainey,* 391 F.3d 25, 32 (1st Cir.2004); *cf. United States v. Arvizu,* 534 U.S. 266, 277, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002) ("A determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct.").

1. Information Defendants Had Regarding Time of Death

As Michael admits in his opposition, Stephanie was stabbed to death between 10:00 and 11:00 p.m., and defendants had this information at the time of his arrest. *See* Plaintiff Michael Crowe's Points and Authorities in Opposition to Defendants Ralph Claytor, Mark Wrisley, Barry Sweeney, Phil Anderson, and City of Escondido's Motion for Summary Judgment, or in the Alternative, Partial Summary Judgment of the Claims Asserted by Michael Crowe ("Michael's Opposition") at 19:4-17.

2. Information Defendants Had Regarding Stephanie's Body

A review of the crime scene photographs reveals that Stephanie was wearing jeans and a shirt at the time of her death. Cheryl stated during her videotaped interview that it was "weird" that Stephanie was found in her clothes because, although she sometimes fell asleep in her clothes, she usually slept in a big T-shirt and sweats. Transcript of Videotaped Examination of Cheryl Ann[sic] Crowe, January 21, 1998, at 35:1-14. A reasonable officer could have surmised from this statement that it was possible that Stephanie was awake at the time her killer entered her room. Given the fact that no one in the house heard Stephanie scream or heard the Crowe family dog bark, a reasonable officer could have suspected that the murderer was not a stranger to Stephanie.

Defendants arrived at the crime scene after the emergency medical technicians, John Peters and Steve Mandich. Peters and Mandich have testified that when they arrived Stephanie's body was in the position depicted in the actual crime scene photographs. *See* Deposition of John Peters at 48:6-9 and Deposition of Steve Mandich at 28:8-29:5 (Exhibits B and C, Defendants' NOL re: Michael's Claims filed April 26, 2004). A review of the crime scene photographs reveals that Stephanie's body was in the doorway of her bedroom with the door opening into the bedroom. *See* Exhibit I, attached to Defendants' Reply to Michael Crowe's Opposition to Motion for

Summary Judgment, or in the Alternative, Partial Summary Judgment. It is undisputed that, unlike Michael's bedroom door, Stephanie's bedroom was not directly off of the main hallway, but, rather, an alcove connected Stephanie's bedroom to the main hallway. Deposition of Stephen Crowe at 85:28-86:17 (Exhibit 13, Michael's Exhibits). It cannot be disputed that if one were to draw a line to represent the bedroom door in a closed position, Stephanie's head in the crime scene photographs would be on the alcove side of that line while the remainder of her body would be on the bedroom side of that line. It also cannot be disputed that if Stephanie died in this position, with her head in the alcove, the door was open when she died because it would be physically impossible for the door to be closed with her in that position.

The position of Stephanie's body is important to the probable cause analysis because, as will be discussed in section II.C.3, *infra,* Michael made statements to the police that he saw Stephanie's door closed at 4:30 a.m., which would have been impossible had Stephanie been dead in the doorway of her bedroom by 11:00 p.m.

Much of Michael's brief is devoted to attempting to create a genuine issue of material fact regarding the location of Stephanie's body when she died by demonstrating that a reasonable factfinder could find that the family members moved the body prior to the arrival of the EMTs. However, the relevant inquiry in a probable cause analysis is not whether Stephanie was actually moved prior to the EMT's arrival but,

rather, what information, if any, the police had at the time of Michael's arrest that suggested that one or more of the family members moved the body prior to the EMT's arrival and that, therefore, Stephanie did not die in the position that she was found by the EMTs. *See Martin,* 509 F.2d at 1213; *Bernard,* 623 F.2d at 559; *Hillison,* 733 F.2d at 697.

a. What Cheryl and Stephen Told Defendants Prior To Michael's Arrest

A review of Cheryl's videotaped questioning by police reveals that she did not tell defendants that she moved Stephanie's body. Moreover, Cheryl drew a diagram of the crime scene for defendant Sweeney which a reasonable officer could interpret as showing Stephanie's head in the alcove, consistent with the crime scene photographs. *See* Exhibit K, attached to Defendants' Reply to Michael Crowe's Opposition to Motion for Summary Judgment, or in the Alternative, Partial Summary Judgment.

A review of Stephen's videotaped questioning by police reveals that Steven did not tell defendants that he moved Stephanie's body or that she was found in her room with the door closed. In fact, Stephen denied moving the body, as illustrated by the following colloquy between Stephen and defendant Sweeney at the police station:

> Q. Think of this though, Steve. After you tried to use the phone, you tried to pick her up. Did you move her at all?

A. No. I couldn't move her. She was stiff. She was all stiff and I couldn't move her. . . .

Transcript of Videotaped Examination of Stephen Crowe, January 21, 1998, at 15:20-24. Stephen did not make any statements in his recorded interview about the position of the body *vis-a-vis* the doorway.

Cheryl and Stephen now both state in their declarations filed in opposition to the motion for summary judgment: "Every time I was interviewed by the police I told them the true position of Stephanie's body, which was inside the room." *See* Omnibus Decl. of Stephen Crowe ¶ 3 (Exhibit 44), Plaintiff Michael Crowe's List of Documents Presented in Opposition to [Defendants'] Motion for Summary Judgment or in the Alternative, Partial Summary Judgment of the Claims Asserted by Michael Crowe ("Michael's Exhibits"); Omnibus Decl. of Cheryl Crowe ¶ 4 (Exhibit 45, Michael's Exhibits). Moreover, Cheryl now states that she believes that she moved Stephanie, while Stephen states that he did move Stephanie. *See* Omnibus Decl. of Cheryl Crowe ¶ 24; Omnibus Decl. of Stephen Crowe ¶ 3. However, there is a videotape of Cheryl and Stephen being interviewed by the police officer defendants, and it cannot be disputed that during these tape recorded interviews not only did Cheryl and Stephen not make statements indicating that Stephanie's entire body, including her head, was inside the room or that her body was moved but they made statements to the contrary. Moreover, Stephen testified at his civil deposition that when he found Stephanie her head

was in the alcove and the remainder of her body was in her room. Specifically, Stephen testified:

> Q. When you got out into the hallway and you got to Stephanie, where was she?
>
> A. She was laying on the floor. There's an alcove that goes back and it's the depth of the closet. It's about three feet. Her head was lying -- her body was inside her room and her head was right at the doorjamb.
>
> Q. If you drew a line at the position where the door would be if it was fully shut – if you drew that line across the doorjamb, was her head or any part of her body on the hallway side or the alcove side of that line?
>
> A. Yes, her head was.
>
> Q. How much of her head?
>
> A. Just from the neck up.
>
> Q. So if you drew that line across there, it would bisect her neck; is that correct?
>
> A. That's correct.

Deposition of Stephen Crowe at 85:28-86:17 (Exhibit 13, Michael's Exhibits). Thus, Cheryl and Stephen's statements regarding what they remember telling police more than six years ago, which are inconsistent with their recorded statements to police and with Stephen's deposition testimony, are not sufficient to require this court to assume on this motion for summary judgment that defendants knew or should have known that the body was not initially in the position

depicted in the crime scene photographs. *See Burrell v. Star Nursery, Inc.*, 170 F.3d 951, 954 (9th Cir.1999) (refusing to reverse district court's grant of summary judgment based on plaintiff's affidavit, which contained allegations that "appeared for the first time" in the affidavit and which contradicted her earlier deposition testimony); *Kennedy v. Allied Mutual Ins. Co.*, 952 F.2d 262, 266 (9th Cir.1991) ("The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony.").

Moreover, even if Cheryl and Stephen were interviewed by police at another time, which it is not clear on this record that they were, the fact that they may have at that time told the police that Stephanie had been moved and was not in the position in which she was found by the EMTs does not establish that, for purposes of the probable cause analysis, defendants were required to assume that Stephanie died inside her bedroom with the door closed. Police officers are constantly required to sift through volumes of evidence and witness statements that are not always consistent, and the police must make judgment calls regarding which witness statements to believe and which not to believe. Given the statements of Cheryl and Stephen in their recorded interviews, it was not unreasonable for defendants to conclude, for purposes of determining whether there was probable cause to arrest Michael, that Stephanie died in her doorway with the door open. This is true even if Cheryl and Stephen made other, unrecorded statements to the contrary.

b. What Kennedy Told Defendants Prior to Michael's Arrest

A review of Kennedy's videotaped questioning by police reveals that Kennedy did not tell police that she moved the body.[7] Although Michael contends that Kennedy told defendants prior to Michael's arrest that when she found Stephanie, Stephanie was in her room and that the door was closed, this is a mischaracterization of her statements, as the following colloquy between defendant Wrisley and Kennedy illustrates:

> W: When you got up due to the alarm and you went out and you found Stephanie *in the doorway* I guess there –
>
> K: Uh-huh [yes][8]
>
> W. Did you go into her room at all?
>
> K: No, I just stepped inside and I saw her laying there and I thought this is – something's wrong here. . . .

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[7] In fact, Judith Kennedy has consistently maintained throughout this civil litigation that she did not move the body. *See* Judith Kennedy DT p. 16:1-4 (Exhibit D, Response of Defendant Barry Sweeney to Plaintiffs' Supplemental Reference to the Evidence in Opposition to MSJ or in the Alternative, Partial Summary Judgment)

[8] This utterance by Kennedy is not reflected in the transcript of the videotape but is clearly evident to a listener of the videotape.

Transcript of Videotaped Examination of Judith Ann Kennedy, January 21, 1998, at 22:14-18. Having reviewed this portion of the videotape, it is clear that Kennedy did not correct defendant Wrisley when he referred to Stephanie being "in the doorway" and that Kennedy answered "no" to the question of whether she went into Stephanie's room. As noted, it is undisputed that, unlike Michael's bedroom door, Stephanie's bedroom was not directly off of the main hallway, but, rather, an alcove connected Stephanie's bedroom to the main hallway. Thus, it was entirely reasonable for defendant Wrisley to believe that Kennedy was referring to "stepping inside" the alcove and not Stephanie's bedroom.

In addition, it must be noted that because the relevant question here is what evidence defendants had in their possession regarding the position of Stephanie's body *at the time they arrested Michael for her murder,* Michael's assertion to the contrary notwithstanding, it is irrelevant what Kennedy stated about the position of the body at the proceeding (referred to as a "707 hearing")[9] which was held in order to determine whether Michael should be tried in adult rather than juvenile court, as that hearing occurred after his arrest.

Finally, because the probable cause inquiry is whether the inferences defendants drew from the

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[9] *See* Cal. Welf. & Inst.Code 707.

facts in their possession were reasonable, that plaintiffs' expert, Victor Cestaro, has, based on blood smears, opined[10] that Stephanie died inside her bedroom with the door closed does not mean that a reasonable officer could not have concluded based on all of the information in defendants' possession that Stephanie died with her head in the alcove and door open as depicted in the crime scene photographs. *See Cox,* 391 F.3d at 32 ("[T]he availability of alternative inferences does not prevent a finding of probable cause so long as the inference upon which the officer relies is reasonable.").

In conclusion, given that (1) when defendants arrived on the scene Stephanie's body was in the doorway, in that her head was in the alcove and the rest of her body was in the bedroom; (2) defendants had in their possession statements by the family that were consistent with Stephanie's body being found in the doorway; (3) and it would be physically impossible for the door to be closed with Stephanie's body in that position, a reasonable officer could have based his probable cause determination on the assumption that Stephanie died in the doorway of her bedroom with the door open.

3. Michael's Story

It is undisputed that in two different interviews Michael told defendants that he woke up at 4:30 a.m.

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[10] *See* Exhibits 56 and 57, Michael's Exhibits.

and went to the kitchen to get some Tylenol because he had a headache. In both interviews, Michael stated that there was enough light that he could see that Stephanie's door was shut. Specifically, during one questioning, Michael stated as follows:

Q. What was the next thing that you remember?

A. I woke up and I turned on the TV so I could see, and I think the clock said 4:30.

. . .

Q. Did you turn the TV on to watch it or just turn it on to –

A. Turned it on to see around the room.

Q. Kind of using that for light?

A. Yes.

Q. Then what did you do?

A. I had a horrible headache, so I got up out of bed, went to the kitchen.

Q. Now, your bedroom door is open or closed?

A. When I sleep?

Q. No. When you woke up and you went on your way to the kitchen, was it opened or closed.

A. I think I left it open.

Q. When you went out, I know you got to into the hallway to get to the kitchen, correct?

A. Yes.

Q. How could you see where you were going?

A. I think the light by what you call the front doors, the double doors, that light was on. I think there is an automatic switch on it.

. . .

Q. How about the hallway light, is it on or off?

A. I'm pretty sure it was off.

Q. And obviously when you leave your room, your view is right across to Stephanie's room. And is her room opened or closed?

A. Closed.

Q. And you see nothing unusual at all?

A. Nothing unusual.

Q. Did you go to the kitchen?

A. Yes.

. . .

Q. How long were you in the kitchen?

A. Fifteen minutes. When I got back I left the TV on and I think it said 4:45.

. . .

Q. So Stephanie's door was shut?

A. Yes.

Q. And what about mom and dad's door?

A. I believe it was shut, too.

Q. And grandma and Shannon's?

A. I believe everything was shut.

Q. If the only light is coming from like here, how could you tell if the doors were shut?

A. I believe I turned on my own light and my door was left open, so I could see the rest of the hallway.

Q. You turned on your bedroom light before you left the room?

A. Yes.

Q. So when you returned back to the room, the light was still on?

A. And that kind of illuminated the hallway a little?

Q. Yes.

. . .

Q. . . . When you got back to your room, you again didn't notice anything?

A. Didn't notice anything.

Q. Nothing unusual?

A. Nothing unusual.

Q. When you got back to your room, what was the next thing you did?

A. I dropped [sic] the milk, took the Tylenol in my room, set the box over there. Then I turned off my light and turned off the TV.

Police Interview of Michael Crowe Taken at the Polinsky Center January 22, 1998, at 21:23-25:28 (Exhibit K, Defendants' NOL re: Michael's claims filed April 26, 2004) (emphasis added). Later that day, Michael again told the police that Stephanie's door was closed:

> A. The next thing I remember after that I woke up with a bad headache. I turned on the TV so I could see in my room because it was dark. The clock on the TV, I think it said 4:30. So I got up and I opened the door, turned on the light, you know, went down to the kitchen to get some Tylenol for my headache. I took the Tylenol and drank the milk. I turned off my light, turned off the TV. I shut my door and went to sleep. . . .
>
> Q. Okay. Can you tell me about the lighting in the house?
>
> A. One light, I think, was left on. I turned on my light and I left my door open and I went to the kitchen, so I could see fairly – I'm pretty sure. I was half asleep and I had a headache, so I think I turned on the kitchen light, as well. . . .
>
> . . .
>
> A. I remember when I walked back all the doors being shut.
>
> Q. Okay. You remember them all being shut. Can you define that for me?

A. All the doors in the hallway, all four, all five of them but the bathroom.

Q. And you're pretty sure about that?

A. I'm pretty sure.

. . .

Q. . . . And the door to Stephanie's room?

A. Yeah, I think that was shut.

Q. That was shut. You're pretty confident about 4:30?

A. Yes.

Q. And could you briefly describe the lighting in the hallway?

A. I didn't turn on the hallway light, I don't think, but I did have my door open with my light on. So it was dim, but I could still see pretty well. Like I said I was still half asleep at the time. I kind of stumbled into the kitchen.

Videotaped Interview of Michael Stephen Crowe, January 22, 1998 at 7:27-10:17 (Exhibit U, Defendants' NOL re: Michael's claims filed April 26, 2004) (emphasis added).

Given that the information in defendants' possession suggested that Stephanie was dead by 4:30 a.m. and that she died in her doorway with the door open, Michael's statements that Stephanie's door was closed at 4:30 a.m. would have given a reasonable

officer reason to believe that Michael was lying and was involved in Stephanie's murder.

Michael's contention in his declaration that he initially stated to defendants in an unrecorded interview that he did not know whether Stephanie's door was closed when he went to the kitchen at 4:30 a.m. does not change the fact that, as detailed *supra*, Michael made later, unequivocal statements that there was sufficient light to see and that he was certain that Stephanie's door was closed. Michael fails to cite any authority for the proposition that his later statements cannot be considered in determining whether there was probable cause to arrest him because these statements were made, in some instances, in response to leading questions. A reasonable officer could have relied on these later statements in making a probable cause determination.

4. The state of the windows and doors

Finally, the state of the windows and doors is another factor upon which a reasonable officer could have relied in forming the belief that Michael was involved in Stephanie's murder.

a. The laundry room or "front" door

Construing the facts in the light most favorable to Michael, at the time of Michael's arrest, defendants knew that fellow officer Scott Walters saw the door to the Crowe house close at approximately 9:58 p.m. on

the night of the murder. However, a reasonable officer could have concluded that an intruder[11] was not entering through the laundry room door at that time. Although defendants knew that the members of the Crowe household denied that they were the ones who closed the door, Michael operates under the mistaken assumption that a police officer must believe everything a suspect says, and that when a suspect is arrested based on facts that are different than those relayed by the suspect, probable cause cannot exist. This is not, however, the standard. *See Ahlers v. Schebil,* 188 F.3d 365, 371 (6th Cir.1999) ("In fact, law enforcement 'is under no obligation to give any credence to a suspect's story [or alibi] nor should a plausible explanation in any sense require the officer to forego arrest pending further investigation if the facts as initially discovered provide probable cause.'") (quoting *Criss v. City of Kent,* 867 F.2d 259, 263 (6th Cir.1988)); *see also Taylor v. Paladines,* 983 F.Supp. 750, 753 (N.D.Ill.1997) (concluding that police officer was entitled to qualified immunity where the officer arrested an innocent individual who provided an explanation for her actions prior to her arrest). If this were the standard, confronted with two conflicting sets of facts – with one set of facts being relayed by

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[11] Certainly, the police could have believed that someone entered the house through that door. However, because, as will be explained, the evidence suggested that the laundry room door was locked by 9:00 p.m., *see* Exhibit 295, the police could have believed that the individual who closed the door as Officer Walters looked on was not an intruder in the classic sense.

the suspect – the police would certainly hesitate to arrest a suspect unless they were sure that the evidence proved beyond a reasonable doubt that the suspect was guilty. Otherwise, the police would risk the suspect not being convicted and then suing them. Again, "[t]he long-prevailing standard of probable cause protects 'citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime,' *while giving 'fair leeway for enforcing law in the community's protection.'*" *Pringle,* 540 U.S. at 369, 124 S.Ct. 795 (quoting *Brinegar,* 338 U.S. at 176, 69 S.Ct. 1302). This probable cause standard recognizes that the police will not always arrest the right person and must be able to weigh evidence and make reasonable judgment calls about who is lying to them and who is not.

That a police officer need not believe every piece of information a suspect conveys is particularly true when information gained from the suspect is inconsistent with other evidence. Here, it is undisputed that in an unrecorded interview prior to Michael's arrest, Kennedy told defendant Sweeney that before going to bed at approximately 9:00 p.m. she checked the sliding glass door and the laundry room door to see if they were locked. *See* Exhibit 295. Michael concedes that Kennedy told Sweeney that the lock was "right." *See* Michael's Opposition at 25:4. Michael has presented evidence from which it could be concluded that given the way that lock on the laundry room door operates, Kennedy could have been indicating that the door was unlocked. However, the inquiry is what defendants could have reasonably believed

based on Kennedy's statement that the lock was "right." *See Reynolds v. County of San Diego,* 84 F.3d 1162, 1170 (9th Cir.1996) (explaining that the fact that there might be "'another reasonable or more reasonable interpretation of events'" does not mean that a reasonable officer could not have believed that his conduct was justified), *overruled on other grounds by Acri v. Varian Assocs. Inc.,* 114 F.3d 999 (9th Cir.1997) (quoting *Hunter,* 502 U.S. at 228, 112 S.Ct. 534). It was not unreasonable for defendants to interpret Kennedy's statement as a statement that the door was locked when she checked it, because a reasonable officer could conclude that one would not check a door to see if it was locked but not lock it if it was found to be unlocked.

Moreover, Stephen Crowe told defendants that the laundry room door, which the family referred to as the "front door," was locked the morning that Stephanie was discovered murdered. Specifically, he stated:

> Q. And Cheryl's mom usually goes and checks to make sure the doors are all locked also. In fact, the door to the laundry room was locked this morning also. The dead bolt was latched. So I tried to unlock (inaudible) door. I pulled on the door and it wouldn't open because someone locked the dead bolt. *That's why I would assume Cheryl's mom shut the front door before retiring.*
>
> A. Okay. I know. You call that the laundry door?
>
> Q. Yeah. The far door (inaudible).

Transcript of Videotaped Examination of Stephen Crowe at 9:18-27 (emphasis added). Thus, even though each of the family members denied being the one who opened and closed the door at approximately 9:58 p.m., given the evidence suggesting to defendants that Kennedy locked the door at approximately 9:00 p.m., it would not be unreasonable for defendants to conduct their investigation based on the assumption that it was possible that it was not an intruder who Officer Walters saw closing the laundry room or "front" door at 9:58 p.m.

Michael points out that according to Sweeney's notes from an unrecorded interview of Kennedy, Kennedy said that the family never used the deadbolt on that door. *See* Exhibit 295. However, given all of the other information in defendants' possession regarding the state of the doors and windows and the state of the laundry room door in particular and given that Stephen appeared to assume that Kennedy was the one who deadbolted the door, this statement by Kennedy does not serve to negate the existence of probable cause to arrest Michael.

b. Stephanie's Window

A reasonable officer could have concluded that the killer did not enter or exit through Stephanie's bedroom window. Stephanie's window, which was a metal slider, was not locked nor completely closed due to a phone cable leading from the outside which entered the room through the window in the bottom

corner. However, a review of the crime scene photographs shows two flag-like objects hanging underneath the windows as decorations which appear undisturbed. A review of the photograph of this window also reveals that it is some distance from the ground and that, although someone could certainly enter the room through the window, the window would not provide easy ingress or egress.

Michael notes that Stephanie's friend, Amanda Reidy, told defendants that she was talking to Stephanie between 9:45 and 10:00 p.m. and Stephanie stated that the cat had come in through her window. However, the fact that Stephanie's window was open during her telephone conversation is not a fact that would compel the police to conclude that the killer came through the window because Stephanie could have closed the window after the conversation.

c. The sliding doors off of the kitchen

A reasonable officer could have concluded that the killer did not enter the house through either of the sliding glass doors off of the kitchen. One of the sliding glass doors was found to be closed and locked during the investigation. Although defendants found the other sliding door closed but unlocked, Stephen Crowe stated in his videotaped interview that he unlocked that sliding door on the morning of the murder. *See* Transcript of Videotaped Examination of Stephen Crowe at 8:17-9:16.

d. The master bedroom sliding glass door

Michael contends that the police should have concluded that killer was an intruder who either entered or exited through the sliding door in the master bedroom door because the door was unlocked[12] and because, although the vertical blinds covering the door were closed, one of the blinds was hung up on the handle of the door and the screen on the door was partially opened, which was consistent with someone going through the door with the blinds closed. Therefore, Michael argues, defendants should have known that Michael was not the killer.

Although the state of the door may have been consistent with someone passing through the door, the other evidence defendants had in their possession

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[12] Although Michael contends that the master bedroom door was partially open, there is no evidence of record suggesting that the master bedroom door was partially open. When asked about the condition of the master bedroom door, Sweeney testified that he believed "it was closed but not locked." Deposition of Barry Sweeney at 143:7 (Exhibit 14, Michael's Exhibits). When later asked whether the door was slid into the frame, Sweeney answered, "I don't recall how closed it was. *If it was open*, it was only about an inch or two inches, but I don't recall how closed it was." *Id.* at 144:4-6. Officer Houchin testified that he was aware that the door was unlocked. *See* Deposition of John Houchin at 141:23-25 (Exhibit 16, Michael's Exhibits). Officer Houchin did not testify that the door was partially open. Nowak's report states that the door was unlocked but closed. *See* Exhibit 93 to Plaintiffs' Supplemental List of Evidence Supporting Opposition to Sweeney's Motion.

suggested that the killer did not pass through this door on the night of the murder. Although Cheryl stated that she was in her bedroom by 10:00 p.m., she also stated to police that she did not go to sleep until 11:00 p.m. – which, as Michael admits in his opposition, is the latest time at which Stephanie was alive. *See* Transcript of Videotaped Examination of Cheryl Ann[sic] Crowe at 14:4-6; Michael's Opposition at 19:4-7. Given the fact that defendants had reason to believe that Stephanie was dead by the time that Cheryl went to sleep, the unlocked state of the door and the state of the vertical blinds did not negate the existence of probable cause to believe that Michael was involved in Stephanie's murder.

d. The garage door

The door to the double-car garage was closed but not locked. Michael makes much of this fact; however, no reasonable officer could have concluded that it was possible for the killer to enter the house through the garage door because a review of crime scene photograph 4, which according to the date stamp was taken approximately a week after the murder, reveals that the garage door swings out, and photographs 3 and 5, which were taken the day Stephanie's body was discovered as evidenced by the ambulance in the driveway, reveals that there were two vehicles parked in front of the door, which would have made it impossible for someone to open the garage door. *See also* Escondido Police Department Evidence Report, Exhibit F, Defendants' NOL re: Crowe Family's

Claims filed April 26, 2004 (noting that two vehicles were parked in front of the garage door on the morning of the murder).

e. The remaining doors and windows

It is undisputed that the remaining doors and windows were locked. Michael notes that the double doors that most would refer to as the front doors to the house have the type of lockset that allows one to exit even though the door is locked to the outside. Therefore, an intruder could have left the house by means of these doors. However, as noted, a reasonable officer could have concluded from all of the evidence in defendants' possession regarding the state of the windows and doors that an intruder did not enter the Crowe house on the night of the killing, and therefore the fact that an intruder could have escaped through the front door did not negate the existence of probable cause to believe that Michael was involved in Stephanie's killing.

5. Why the information the police had regarding Tuite did not negate the existence of probable cause

Michael spends numerous pages of his opposition setting forth facts and arguments regarding why Tuite, the transient who was ultimately convicted of Stephanie's murder, was the real killer. Michael contends that it was Tuite that Officer Walters saw entering the Crowe house at approximately 9:58 p.m.

and that after, killing Stephanie, Tuite exited either through the master bedroom sliding glass door or through the double front doors. Michael's tack is unavailing, however.

The issue here is not who killed Stephanie but, rather, whether reasonable, not perfect, police officers could have believed at the time of Michael's arrest that Michael was involved in Stephanie's murder. As will be demonstrated, even though defendants did have evidence in their possession placing Tuite in the vicinity of the Crowe house at the time of the murder, a reasonable officer possessing this evidence could have nonetheless concluded at the time of Michael's arrest that Michael, not Tuite, was involved in Stephanie's murder.

Michael correctly notes that at the time of Michael's arrest, defendants had eye witness accounts placing Tuite in the neighborhood of the Crowe house at the time of the murder. Those eye witness accounts described an individual who was loud, drunk or high, and agitated and who was knocking on doors looking for "Tracy." *See Crowe*, 303 F.Supp.2d at 1075. However, as noted in section II.C.4, *supra*, a reasonable officer could have concluded from the information defendants had regarding the state of the windows and doors that Tuite's only means of ingress was Stephanie's window or the Crowe master bedroom sliding glass door. Specifically, given that a reasonable officer could have believed that the laundry room or "front" door was locked by Judith Kennedy at 9:00 p.m., and given that Stephen stated that this door

was locked in the morning, a reasonable officer could have concluded that Tuite did not enter the Crowe house through that door at approximately 10:00 p.m. Given that the clothed state of Stephanie's body suggested that she was awake when the killer entered her room and given that no one in the house heard Stephanie scream, a reasonable officer could have concluded that a loud and agitated individual such as Tuite did not enter Stephanie's room through her window. Given that Stephanie was dead by 11:00 p.m. and given that Cheryl Crowe told defendants that she did not go to sleep until 11:00 p.m., *see* Transcript of Videotaped Examination of Cheryl Ann[sic] Crowe at 14:4-6, a reasonable officer could have concluded that a loud and agitated individual such as Tuite did not enter or exit the Crowe house through the master bedroom sliding door on the night of the murder.

That a reasonable officer could have discounted the theory that Tuite was the killer is not altered by the fact that both Cheryl and Michael reported hearing banging at some point in the night. Cheryl was not sure what time she heard the banging, and by her own account she thought at the time that she was dreaming. Transcript of Videotaped Examination of Cheryl Ann[sic] Crowe at 16:15-17:12. Similarly, when asked what time he heard the banging, Michael was unable to pinpoint a time, stating simply that he thought it was before midnight. *See* Police Interview of Michael Crowe Taken at the Polinsky Center January 22, 1998, at 19:12-21:14

(Exhibit K, Defendants' NOL re: Michael's claims filed April 26, 2004). However, importantly, Cheryl reported that she heard the banging after she went to sleep, and defendants had reason to believe that Stephanie was dead by the time that Cheryl went to sleep. *See* section II.C. 1, *supra*. Because a reasonable officer could have concluded from Cheryl and Michael's statements that the banging occurred after Stephanie's death, and because both Cheryl and Michael indicated that they thought that the banging came from the laundry room door, which as explained in Section II.C.4.a, *supra*, a reasonable officer could have believed was locked, a reasonable officer could have discounted the fact of the banging in determining there was probable cause to arrest Michael.

Michael also points to several statements made by Cheryl that defendants had in their possession at the time of Michael's arrest. First, Cheryl reported in her videotaped interview that her bedroom door opened and closed twice "in the middle of the night." Specifically, Cheryl reported:

> Something weird happened. I don't know if it was (inaudible) something opened my door twice. I don't know what it was *in the middle of the night*. I thought it was the cats, but I don't know how it could have been the cats, cause we have cats. They opened it and then shut it. Opened it and then shut it. (inaudible) I fell back to sleep. I feel really bad because I didn't get up. Why didn't I get up? (inaudible) More I think about it, the more I think the cats can't shut the door and open

> it. (inaudible) I don't know. That wasn't a real (inaudible) woke up.

Transcript of Videotaped Interview of Cheryl Ann [sic] Crowe at 23:23-24:5 (emphasis added). Michael contends Tuite was the one who opened the master bedroom door and defendants should have known this. However, as detailed in this section, *supra*, the evidence defendants possessed at the time of the arrest suggested that Tuite did not enter the Crowe house. Moreover, given that the information defendants possessed suggested that Stephanie was dead by the time that Cheryl Crowe went to sleep, if Tuite was the one who opened the master bedroom door in the middle of the night after Cheryl went to sleep, Tuite would have had to have remained in the Crowe house undetected for some time after the killing, a proposition that a reasonable officer could have found to be unlikely given Tuite's agitated state.

6. The Alleged Conspiracy to "Pin" the Crime on Someone in the House

A significant part of Michael's brief is also devoted to demonstrating that there was a conspiracy amongst the defendants to "pin" the crime on one of the members of the Crowe household. However, this tack is availing, as the motive of the police in arresting a defendant is irrelevant to a determination of whether there was probable cause to arrest. *See Whren v. United States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth

Amendment analysis."); *Scott v. United States,* 436 U.S. 128, 138, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978) ("[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action."); *Lee v. Gregory,* 363 F.3d 931, 935 (9th Cir.2004) ("Gregory is correct that allegations of ulterior motives cannot invalidate police conduct that is justified by probable cause.") (citing *Whren v. United States,* 517 U.S. 806, 811-15, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996)).

Finally, in a footnote, Michael criticizes the police for apparently failing to ask if anything in the house was moved or was out of place, a question which, if asked, may have led to the discovery of facts that may have led to a belief early on that Tuite was the murderer. However, the Fourth Amendment does not guarantee citizens that the police will conduct a perfect crime scene investigation or that they will arrest the right person – the Fourth Amendment simply guarantees that the police will not arrest without probable cause. As one district court has explained:

> Although this standard may seem harsh from the perspective of one who is wrongfully arrested, it is well grounded in policy and the real-world life of investigating officers. Often, officers must make arrest decisions based upon information that is incomplete

> and still developing. To subject officers to liability for wrong decisions – or for not conducting a thorough investigation – would chill investigative work and, no doubt, result in guilty parties being allowed to flee or intimidate witnesses.

Ahlers v. Schebil, 994 F.Supp. 856, 877 (E.D.Mich.1998), *aff'd,* 188 F.3d 365 (6th Cir.1999). It is not the place of the judiciary to dictate the manner of homicide investigations after the fact. Rather, it is the role of the judiciary to evaluate whether, given the facts in the possession of the police at the time of the arrest, a reasonable police officer could have believed that the individual arrested committed the crime. That standard is met here.

D. Even Absent Probable Cause to Arrest, Defendants are Entitled to Qualified Immunity

Even if it were to be determined that there was not probable cause to arrest Michael, a reasonable police officer confronted with the facts outlined above could have believed there was probable cause to arrest Michael for Stephanie's murder, and therefore defendants would be entitled to qualified immunity. *See Johnson,* 340 F.3d at 793-4 ("Because we conclude that Deputy Woodard did not violate Johnson's Fourth Amendment rights, we need not reach the immunity inquiry. However, had we concluded that the use of force was not objectively reasonable, we could not conclude that it was a violation of Johnson's

clearly established rights.") (internal citation omitted).

As the Supreme Court has explained, in the Fourth Amendment context, it is "inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present," and "in such cases those officials – like other officials who act in ways they reasonably believe to be lawful – should not be held personally liable." *Anderson,* 483 U.S. at 641, 107 S.Ct. 3034. As the Ninth Circuit aptly noted in *Smiddy v. Varney,* 665 F.2d 261 (9th Cir.1981), "[i]t is necessary that police officers be immune when they reasonably believe that probable cause existed, even though it is subsequently concluded that it did not, because they 'cannot be expected to predict what federal judges frequently have considerable difficulty in deciding and about which they frequently differ among themselves.'" *Id.* at 266 (quoting *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 456 F.2d 1339, 1349 (2d Cir.1972) (Lumbard, J., concurring)). Thus, a police officer is entitled to qualified immunity if a reasonable officer possessing the same facts as the defendant officer *could have* reasonably believed that the search or arrest was supported by probable cause even if a court later determines it was not. *See Bilbrey v. Brown,* 738 F.2d 1462, 1467 (9th Cir.1984) ("Appellees could therefore qualify for immunity from damages if they reasonably, but mistakenly, believed that they had reasonable cause or probable cause to search appellants."); *see also Forster v. County of Santa*

Barbara, 896 F.2d 1146, 1147-1148 (9th Cir.1990) (finding an officer is "qualifiedly immune from a suit for damages . . . unless 'a reasonably well-trained officer in [his] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant'") (quoting *Malley v. Briggs,* 475 U.S. 335, 345, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)).

Even though the court must take the *facts* in the light most favorable to Michael, the court need not accept only Michael's version of what constitutes a *reasonable inference from those facts,* as the inquiry is not whether *every* reasonable officer would have believed there was probable cause but whether *any* reasonable officer could have believed there was probable cause based on the facts in defendants' possession and the reasonable inferences that could be drawn from those facts. *See Reynolds,* 84 F.3d at 1170 (explaining that a police officer should not be denied qualified immunity simply because other officers could disagree with the challenged conduct). As the Fourth Circuit has explained in the context of a qualified immunity analysis, to the extent there is a factual dispute concerning what the police officer knew, the dispute must be resolved in the § 1983 plaintiff's favor; however, to the extent a police officer decided to discount conflicting evidence in his possession, the court "need not accept such discounted evidence in the light most favorable to" the plaintiff. *Gomez v. Atkins,* 296 F.3d 253, 261 (4th Cir.2002), *cert. denied,* 537 U.S. 1159, 123 S.Ct. 964, 154

L.Ed.2d 893 (2003). Otherwise, the possibility of qualified immunity would be eliminated in § 1983 cases because "the officer could never be deemed to have acted reasonably." *Id.* Thus, to the extent an officer discounted certain evidence, the court "must assess whether, in so doing, he acted in an objectively reasonable manner. . . ." *Id.*

Ninth Circuit case law is in accord. For example, the Ninth Circuit has held that "[t]he fact that an expert disagrees with an officer's actions does not render the officer's actions unreasonable" because "[t]he inquiry is not 'whether another reasonable or more reasonable interpretation of events can be constructed . . . after the fact.'" *Reynolds,* 84 F.3d at 1170 (quoting *Hunter,* 502 U.S. at 228, 112 S.Ct. 534). "Rather, the issue is whether a reasonable officer could have believed that his conduct was justified." *Reynolds,* 84 F.3d at 1170. "'*This is so notwithstanding that reasonable officers could disagree on the issue.*'" *Id.* (quoting *Act Up!/Portland v. Bagley,* 988 F.2d 868, 872 (9th Cir.1993)) (emphasis added).

As detailed *supra,* defendants had a number of facts in their possession from which a reasonable officer could have believed there was probable cause to arrest Michael Crowe. First, Stephanie was found dead in her clothes, which her mom thought was "weird" and which could have suggested to a reasonable officer that Stephanie was awake when her attacker entered her room. Combined with the fact that none of the other five members of the household heard Stephanie scream, a reasonable factfinder

could have suspected that Stephanie knew her attacker. Although defendants knew that a crazed transient was in the neighborhood and that members of the Crowe household denied that they were the ones who Officer Walters saw opening and closing the laundry room or "front" door around 10:00 p.m., given the fact that Kennedy told police that she checked that door around 9:00 p.m., a reasonable officer could have believed that the door was locked by 10:00 p.m. and therefore the killer was not a transient who came in through that door.

Moreover, a reasonable officer could have found Michael's statements regarding Stephanie's door being closed to be suspicious. Even assuming that the police had some information in their possession suggesting that Stephanie died completely inside her bedroom, they had contrary videotaped statements by Cheryl and Stephen suggesting that Stephanie died in her doorway and was not moved prior to the arrival of the EMTs. Furthermore, a reasonable officer could have interpreted Kennedy's statements as being consistent with Stephanie's body being in the doorway. Thus, a reasonable officer could have pursued the investigation based on the belief that Stephanie died no later than 11:00 p.m. with the door open.

Furthermore, even if Michael initially stated to police that he did not know whether Stephanie's door was open or closed when he went to the kitchen at 4:30 a.m., it is undisputed that he subsequently stated unequivocally in two subsequent taped or videotaped interviews that he saw that Stephanie's

door was closed. In light of these facts, it would not have been clear to a reasonable officer that there was no probable cause to arrest Michael, even taking into account the additional evidence defendants had at that time regarding Tuite.

Finally, it is irrelevant whether defendants were engaged in a conspiracy to "pin" the murder on Michael because qualified immunity is not to be denied because of a police officer's subjective beliefs or motives. *See Anderson,* 483 U.S. at 641, 107 S.Ct. 3034 ("The relevant question in this case, for example, is the objective . . . question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed. Anderson's subjective beliefs about the search are irrelevant.").

Strip Search of Michael Crowe

On January 21, 1998, Michael Crowe underwent a strip search whereby he removed all of his clothes except his underwear and was photographed. A strip search is constitutional if the individual to be searched gives consent, if the consent is freely given. *Good v. Dauphin County Social Servs.,* 891 F.2d 1087, 1093 (3rd Cir.1989).

A review of Michael's civil deposition testimony reveals that he gave his consent to the search and the photographs and that his consent was freely given. Specifically, Michael testified:

Q. Do you recall anything else your father said about the subject of the photographs?

A. Later, right before he did it, he told us just to go ahead and do it and help them out. Just do whatever we could to help.

Q. Did he say why he wanted you to go ahead and do the photos to help out?

A. He just told us to go do the photos to help out.

Q. When he said to help out, did you understand that to mean that he was asking you to go ahead with the photographs to help the officers determine what had happened to Stephanie?

A. Yes.

Q. Were you willing to do that then?

A. Yes.

Q. Then did you voluntarily partake in the photographing process?

A. Yes.

Deposition of Michael Crowe at 139:12-140:1 (Exhibit Q, Defendants' NOL re: Michael's claims filed April 26, 2004) (emphasis added). Moreover, in his papers Michael does not deny that he gave consent, nor does he contend that his consent to the search and the photographs was not voluntary. Accordingly, defendants are entitled to summary judgment to the extent that Michael contends that his Fourth Amendment

right to be free of unreasonable searches was violated by the strip search.

Strip Search of the Crowe Family

On January 21, 1998, the Crowe family was subjected to strip searches and photographs. Defendants have failed to demonstrate that, as a matter of law, any consent that Cheryl, Stephen or Shannon gave to the strip searches was given freely. Moreover, defendants have failed to demonstrate that the strip search of these plaintiffs was constitutionally reasonable.[13] In addressing the constitutionality of strip searches, the Supreme Court in *Bell v. Wolfish,* 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) explained:

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

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[13] Plaintiffs do not raise the issue of whether the police must obtain a warrant to perform a strip search under circumstances such as were present here, where plaintiffs were not in custody at the time of the search. Therefore, the court does not consider this issue.

Id. at 559, 99 S.Ct. 1861. The most important factors here are the scope of the strip searches and the justification for them.

The searches of Cheryl, Stephanie and Stephen were extremely intrusive. Stephen was photographed completely nude. Cheryl was photographed without her underwear and Shannon was photographed without a bra.

On the other hand, the justification for initiating these strip searches was nonexistent. Defendants contend that the stripping and photographing of Shannon was necessary to ensure that Shannon had no injuries or signs of mistreatment. However, defendants have failed to demonstrate that they had sufficient reason to believe that Shannon was the subject of abuse to subject her to such a search. Moreover, defendants fail to explain why it was necessary for Shannon to take off her bra in order to determine whether Shannon was the victim of abuse of why it was necessary to photograph her given that no signs of abuse were discovered.

Defendants contend that the stripping and photographing of Cheryl and Stephen was necessary because it was reasonable for the police to check for signs of struggle such as scratches, cuts and bruises. However, defendants have failed to demonstrate that there was sufficient reason to believe at the time of the strip searches that either Cheryl or Stephen were involved in Stephanie's murder.

Finally, defendants contend that because Cheryl was found lying on top of Stephanie and because Cheryl was later seen hugging the other family members, "[e]vidence from the crime scene and from the body could have thus been transferred at least to Cheryl Crowe and then to the remaining members of the Crowe Family in the very minutes after the murder was discovered." Memorandum of Points and Authorities in Support of [Defendants'] Motion for Summary Judgment, or in the Alternative, Partial Summary Judgment of the Claims Asserted by the Crowe Family at 11:17-19. While this reasoning might justify the collection of the families' clothes, it does not justify requiring Cheryl, Shannon or Stephanie to submit to a strip search and photographing, as occurred here.

For purposes of the analysis of defendants' motion, the court concludes that defendants violated the Fourth Amendment by requiring Cheryl, Shannon and Stephen to submit to a strip search. Moreover, a reasonable officer under the same circumstances would have known that there was not sufficient justification to support the searches. Accordingly, defendants' motion for summary judgment is denied with respect to this claim.

Seizure of Hair and Blood from Michael

On January 27, 1998, Detective Claytor sought and obtained a warrant to collect hair and blood samples from Michael. *See* Exhibit W, Defendants'

NOL re: Michael's claims filed April 26, 2004. "Intrusions into the human body, including the taking of blood, are searches subject to the restrictions of the Fourth Amendment." *United States v. Wright,* 215 F.3d 1020, 1025 (9th Cir.2000). To be consistent with the Fourth Amendment, a warrant for such an intrusion must be supported by probable cause. *Id.* The specific inquiry is whether there is "probable cause to believe that the suspect has committed an offense of which the current state of [his] blood will constitute evidence." *United States v. Chapel,* 55 F.3d 1416, 1419 (9th Cir.1995).

As explained in detail, *supra,* there was probable cause to arrest Michael. Therefore, given the brutality of the murder, the amount of blood at the scene, and the hair evidence that was collected, there was probable cause to believe that Michael's blood and hair would constitute evidence.

Alternatively, because a reasonable officer could have believed that there was probable cause to arrest Michael, a reasonable officer could have believed that Michael's blood would constitute evidence.

Accordingly, defendants are entitled to summary judgment as to the seizure of Michael's blood and hair.

Seizure of Blood From Cheryl and Stephen

On February 5, 1998, defendant Claytor sought and obtained search warrants for blood samples from

Cheryl and Stephen. On February 6, 1998, Cheryl and Stephen provided blood samples pursuant to the warrants.

The validity of this search warrant "depends upon the sufficiency of what is found within the four corners of the underlying affidavit." *Taylor,* 716 F.2d at 705. In the affidavit in support of the warrant, defendant Claytor represented (1) that Stephanie Crowe had been stabbed to death in her home; (2) that Cheryl and Stephen Crowe were in the house at the time of Stephanie's death; (3) that blood analysis would tend to show that a "particular" (but unspecified) person committed the murder; and (4) that to have valid test results, all persons that had contact with the victim needed to be eliminated as a source of the blood. *See* Exhibits P and Q, Defendants' NOL re: Crowe family's claims filed April 26, 2004. Nothing in defendant Claytor's affidavit establishes probable cause to believe that Cheryl and Stephen were involved in Stephanie's death, and, in fact, defendants do not argue that there was probable cause to believe at the time the warrant was obtained that Cheryl and Stephen were involved in Stephanie's death. Rather, defendants argue that the seizure of the blood was supported by probable cause because the blood was sought to prove that someone other than Cheryl or Stephen killed Stephanie by eliminating Cheryl and Stephen as the source of the blood at the scene of the crime. This argument is unavailing because pursuant to Supreme Court case law "[t]he substance of all the definitions of probable cause is a reasonable ground

for belief of guilt, *and that the belief of guilt must be particularized with respect to the person to be searched or seized.*" *Pringle,* 540 U.S. at 371, 124 S.Ct. 795 (internal quotation marks and citations omitted) (emphasis added); *see also Ybarra v. Illinois,* 444 U.S. 85, 91, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979) ("Where the standard is probable cause, a search or seizure of a person must be supported by *probable cause particularized with respect to that person.*") (emphasis added). Ninth Circuit case law is in accord. *See Marks v. Clarke,* 102 F.3d 1012, 1027 (9th Cir.1996) (citing *Ybarra*); *Rise v. State of Or.,* 59 F.3d 1556, 1560 (9th Cir.1995) ("[T]he drawing of blood from free persons generally requires a warrant supported by *probable cause to believe that a person has committed a criminal offense* and that *his blood* will reveal evidence relevant to that offense. . . .") (emphasis added), *overruled on other grounds by City of Indianapolis v. Edmond,* 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000); *see also Wright,* 215 F.3d at 1025-26 (finding probable cause to order defendant to provide blood sample in robbery case where robber, who was shot, left blood at the scene and where a tip, combined with additional pieces of evidence, established a fair probability that the defendant was the robber); *Chapel,* 55 F.3d at 1419 (requiring probable cause to believe that the suspect has committed an offense and that the state of his blood will constitute evidence). In light of this case law, a warrant to draw blood is not supported by probable cause where the evidence is sought to prove that another individual has committed a crime by demonstrating that the

individual subject to the blood draw did not commit the crime. Because the facts in the warrant did establish there was a reason to believe that Cheryl or Stephen Crowe were involved in Stephanie's murder, the search warrant for the seizure of their blood was not valid.

Having concluded that the warrant was not supported by probable cause, the next issue is whether defendant Claytor is nonetheless entitled to qualified immunity because it would not have been clear to a reasonable officer that there was no probable cause for the seizure of Cheryl's and Stephen's blood. Where a police officer obtains a warrant, immunity will be lost "where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Mills v. Graves,* 930 F.2d 729, 731 (9th Cir.1991); *see also Malley,* 475 U.S. at 344-5, 106 S.Ct. 1092 ("[W]here the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable . . . the shield of immunity be lost."); *Forster,* 896 F.2d at 1147-48 ("A police officer is qualifiedly immune from a suit for damages arising from an allegedly illegal arrest or search unless 'a reasonably well-trained officer in [his] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant.'") (quoting *Malley,* 475 U.S. at 345, 106 S.Ct. 1092); *Marks,* 102 F.3d at 1026 n. 31 (quoting *Malley*). In light of cases such as *Ybarra* and *Marks,* which were decided prior to the obtaining of the warrant and which

require probable cause *particularized with respect to the person subject to the search or seizure,* a reasonably well-trained officer in defendant Claytor's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant.

This court notes that California law provides that "[a] search warrant may be issued . . . [w]hen the property or things to be seized consist of any item or constitute any evidence that tends to show a felony has been committed, or tends to show that a particular person has committed a felony." West's Ann.Cal.Penal Code § 1524(a)(4). Defendant Claytor's apparent reliance on this statute does not, however, entitle him to qualified immunity, as the contours of the Fourth Amendment are not dictated by state law. *See Knowles v. Iowa,* 525 U.S. 113, 116, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998) (answering in the affirmative the question "whether the search at issue, authorized as it was by state law, nonetheless violates the Fourth Amendment"); *United States v. Becerra-Garcia,* 397 F.3d 1167, 2005 WL 237647 (Feb. 2, 2005) ("The weight of authority establishes that the test of whether a search or seizure violates the Fourth Amendment 'is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed.'") (quoting *Elkins v. United States,* 364 U.S. 206, 224, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960)); *see also Henry v. County of Shasta,* 132 F.3d 512, 522 (9th Cir.1997) (reversing and remanding grant of

summary judgment on plaintiff's Fourth Amendment claim because the district court failed to "address the fundamental question whether the officers' conduct, while consistent with the California statutes, was constitutional."). Because it was clearly established at the time the warrant for the Crowes' blood was obtained that a search that comports with state law does not automatically comport with the Fourth Amendment, *see Henry,* 132 F.3d at 522, a reasonable officer would not have believed that he was entitled to seek the warrant simply because state law appeared to authorize a warrant under the circumstances.

Accordingly, the motion for summary judgment is denied with respect to this claim.

Search of the Crowe Residence

The Crowes bring a Fourth Amendment claim arising out of the search of the house in which they were living at the time of Stephanie's murder. Defendants seek summary judgment with respect to this claim.

"Probable cause to search exists when the known facts and circumstances are sufficient to warrant a reasonable person to conclude that contraband or evidence of a crime will be found." *United States v. Ibarra,* 345 F.3d 711, 716 (9th Cir.2003). The Crowes do not dispute that the warrant to search the house was supported by probable cause or that they gave their consent to search the house. Rather, plaintiffs challenge the extent to which the house, which they

were renting, was damaged by defendants in the course of gathering evidence.

In executing a search warrant, officers may need to damage property. *See Mena v. City of Simi Valley,* 226 F.3d 1031, 1041 (9th Cir.2000); *Liston v. County of Riverside,* 120 F.3d 965, 979 (9th Cir.1997); *Dalia v. United States,* 441 U.S. 238, 258, 99 S.Ct. 1682, 60 L.Ed.2d 177 (1979). "Therefore, the destruction of property during a search does not necessarily violate the Fourth Amendment." *Mena v. City of Simi Valley,* 226 F.3d at 1041; *see also United States v. Becker,* 929 F.2d 442, 446 (9th Cir.1991). "'[O]nly unnecessarily destructive behavior, beyond that necessary to execute a warrant effectively, violates the Fourth Amendment.'" *Mena,* 226 F.3d at 1041 (quoting *Liston,* 120 F.3d at 979); *see also Becker,* 929 F.2d at 446.

According to Cheryl's declaration, when the family returned to the house it was in "rack and ruin." Omnibus Decl. of Cheryl Crowe ¶ 16 (Exhibit 45, Michael's Exhibits). The police had taken "all of the carpet in the hallway, from Stephanie's room, and all of the hallway drywall by Stephanie's room." *Id.* ¶ 17. So much drywall and carpet had been removed that the family had to move out of the house, which they were renting. Moreover, according to Cheryl's declaration, "the removal was so extensive that the structure was affected" and the city had to "come in and shore it up." *Id.* at ¶ 17. The Crowes had to vacate the house because the owner couldn't afford to make the repairs.

Although one can certainly sympathize with a family who, after experiencing the horrific death of their child, is forced to move out of the house they call home, the test is whether defendants engaged in unnecessarily destructive behavior, beyond that needed to execute the warrant effectively.[14] That is not the case. The Crowes have failed to provide any evidence suggesting that defendants took carpeting or drywall from other than the immediate crime scene area – the hallway carpet and drywall and the carpet from Stephanie's room. Given the potential of the carpet and drywall to yield clues in the form of blood, fiber, hair and fingerprints, it cannot be said on this record that defendants crossed over the line drawn by the Fourth Amendment when they removed these items from the house, thereby damaging the house in the process.

Moreover, even if defendants did cross over the line in their collection of evidence, which they clearly did not, a reasonable officer could have believed that removing the carpet and drywall from the crime scene and the immediate surrounding area was necessary and, therefore, constitutional. Thus, defendants would be entitled to qualified immunity.

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[14] Clearly, under such a test, defendant's motives or subjective intentions in conducting the search are irrelevant. Thus, the Crowes' attempt to demonstrate that the resulting damage was due to defendant's malicious motives and not due to their interest in collecting evidence is unavailing. *See Whren,* 517 U.S. at 813, 116 S.Ct. 1769 (explaining that an officer's subjective intentions are irrelevant in a Fourth Amendment analysis).

Accordingly, defendants are entitled to summary judgment with respect to this claim.

The Detention of the Crowes at the Police Station

Cheryl and Stephen bring a Fourth Amendment claim based upon their alleged detention at the police station. According to plaintiffs, when Cheryl and Stephen attempted to leave the police station through a secured door, defendant Wrisley pulled out his gun and pointed it at Stephen's chest, and ordered Stephen and Cheryl back upstairs, where defendant Wrisley told the couple after 15 to 30 minutes that they had to go to a hotel and couldn't go with Stephen's brother, as Stephen had requested. *See* Omnibus Decl. of Stephen Crowe ¶¶ 20, 21 (Exhibit 44, Michael's Exhibits). Stephen further states that defendant Wrisley "said we had to say there and couldn't leave unless we called him first and got permission and told him where we wanted to go." *Id.* at ¶ 21.

"A 'seizure' triggering the Fourth Amendment's protections occurs only when government actors have, 'by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen.'" *Graham,* 490 U.S. at 395 n. 10, 109 S.Ct. 1865 (quoting *Terry v. Ohio,* 392 U.S. 1, 19, n. 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). Taking the facts in the light most favorable to plaintiffs, defendants used a show of authority to detain Cheryl and Stephen for 15 to 30

minutes, which constitutes a seizure triggering the Fourth Amendment's protection.

Because defendants have failed to explain why they were justified in restraining Cheryl and Stephen's liberty or why a reasonable officer would have believed there was justification for restraining their liberty, this claim cannot be resolved on summary judgment.

III. Second Claim for Relief – Violation of the Fifth Amendment

Defendants seek summary judgment with respect to Michael's claim for violation of the Fifth Amendment privilege against self-incrimination. The court previously addressed the scope of § 1983 liability for violation of the Fifth Amendment self-incrimination clause. *See Crowe,* 303 F.Supp.2d at 1086-93. A review of Michael's opposition to the current motion does not change this court's previous conclusion regarding the scope of § 1983 liability for violation of the Fifth Amendment.

The Fifth Amendment, which applies to the States via the Fourteenth Amendment, *Malloy v. Hogan,* 378 U.S. 1, 6, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964), provides that no person "shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V. As the court explained in its previous order, the operation of the Fifth Amendment is clear in some respects. For example, the Fifth Amendment clearly affords one the right to assert the

privilege of silence when being questioned in criminal or civil proceeding "wherever the answer might tend to subject to criminal responsibility him who gives it." *McCarthy v. Arndstein,* 266 U.S. 34, 40, 45 S.Ct. 16, 69 L.Ed. 158 (1924). Moreover, if the assertion of that privilege is ignored or the privilege is involuntarily waived, it is clear that the Fifth Amendment operates to preclude the government's use of the resulting compelled testimony at trial in its case in chief. *See Oregon v. Elstad,* 470 U.S. 298, 306-7, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985). What is not entirely clear is when a § 1983 action may be predicated upon a violation of the Fifth Amendment.

The Supreme Court in *Chavez v. Martinez,* 538 U.S. 760, 123 S.Ct. 1994, 155 L.Ed.2d 984 (2003) was confronted with the issue of whether the § 1983 plaintiff, Martinez, had made out a Fifth Amendment claim where the police had compelled statements from Martinez during interrogation but where those statements were never used by the police or prosecutors because Martinez was never charged with a crime. Justice Thomas, joined by the Chief Justice and two other Justices, concluded:

> Here, Martinez was never made to be a "witness" against himself in violation of the Fifth Amendment's Self-Incrimination Clause *because his statements were never admitted as testimony against him in a criminal case. Nor was he ever placed under oath and exposed to "'the cruel trilemma of self-accusation, perjury or contempt.'" Michigan*

> *v. Tucker,* 417 U.S. 433, 445, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974) (quoting *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964)).

Chavez, 538 U.S. at 767, 123 S.Ct. 1994 (emphasis added) (Thomas, J.). This same plurality also explained that although the Supreme Court has "permitted the Fifth Amendment's self-incrimination privilege to be *asserted* in noncriminal cases, that does not alter our conclusion that a violation of the constitutional *right* against self-incrimination occurs only if one has been compelled to be a witness against himself *in a criminal case.*" *Id.* at 770, 123 S.Ct. 1994 (internal citations and quotations omitted) (first and third emphasis added). Although declining to define the term "criminal case," this plurality concluded that a "criminal case" does not include an interrogation. *See id.* at 766-7, 123 S.Ct. 1994 ("We need not decide today the precise moment when a 'criminal case' commences; it is enough to say that police questioning does not constitute a 'case' any more than a private investigator's precomplaint activities constitute a 'civil case.'").

Although agreeing that Martinez was not entitled to pursue a damages claim for violation of his Fifth Amendment rights, Justice Souter, joined by Justice Breyer, approached the issue before the Court from a policy perspective, concluding that Martinez' claim should fail on the ground that Martinez could not "make the 'powerful showing,' subject to a realistic assessment of costs and risks, necessary to expand

protection of the privilege against compelled self-incrimination to the point of the civil liability he asks us to recognize here." *Id.* at 778, 123 S.Ct. 1994 (Souter, J., concurring in the judgment) (quoting *Miranda v. Arizona,* 384 U.S. 436, 515, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) (Harlan, J., dissenting)).

After *Chavez,* it is clear that the mere act of coercing a confession is not a Fifth Amendment violation upon which a § 1983 claim may be predicated. However, by failing to define "criminal case" as that term is used in the Fifth Amendment, the Thomas plurality left open the issue of whether a § 1983 plaintiff may predicate a Fifth Amendment claim on the use of a coerced confession short of use at trial. Moreover, the Justices in *Chavez* did not directly address a second issue raised here: whether, as Michael urges, a § 1983 plaintiff may predicate a Fifth Amendment claim on the use of a coerced confession at the trial of another. As set forth in detail in *Crowe,* 303 F.Supp.2d at 1086-91, this court has concluded that a § 1983 claim cannot be predicated upon the use of a coerced confession short of use at trial because "criminal case" means "criminal trial." The court need not repeat its reasoning here. Rather, the court now turns to Michael's contention that his statements were used against him at two trials: his and that of Richard Tuite.

Michael's argument that the use of his statements by Tuite in an attempt to demonstrate Tuite's innocence is use "against" Michael and that such use satisfies the requirements of the Fifth Amendment is

simply unavailing. As noted, the Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness *against himself*. . . ." U.S. CONST. amend. V (emphasis added). Moreover, Justice Thomas in *Chavez* repeatedly noted that the Fifth Amendment is only violated when a statement is used *against the speaker*. *See* 538 U.S. at 767, 123 S.Ct. 1994 ("Here, Martinez was never made to be a 'witness' *against himself* in violation of the Fifth Amendment's Self-Incrimination Clause because his statements were never admitted as testimony *against him* in a criminal case.") (emphasis added); *id.* at 768, 123 S.Ct. 1994 ("[W]e have long permitted the compulsion of incriminating testimony so long as those statements (or evidence derived from those statements) cannot be used *against the speaker*. . . .") (emphasis added); *id.* at 769, 123 S.Ct. 1994 ("[M]ere coercion does not violate the text of the Self-Incrimination Clause absent use of the compelled statements in a criminal case *against the witness*.") (emphasis added); *id.* at 770, 123 S.Ct. 1994 (concluding "that a violation of the constitutional right against self-incrimination occurs only if one has been compelled to be a witness *against himself* in a criminal case") (emphasis added); *id.* at 772, 123 S.Ct. 1994 (explaining that "the core constitutional right defined by the Self-Incrimination Clause [is] the right not to be compelled in any criminal case to be a witness *against oneself*.") (emphasis added); *id.* at 772-73, 123 S.Ct. 1994 ("And the absence of a 'criminal case' in which Martinez was compelled to be a 'witness' *against himself* defeats his core Fifth

Amendment claim.") (emphasis added). Furthermore, the Supreme Court in *Kastigar v. United States,* 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972) explained that the Fifth Amendment insures that the use of compelled testimony "cannot lead to the infliction of criminal penalties *on the witness.*" *Id.* at 453, 92 S.Ct. 1653 (emphasis added). The use of Michael's confession by Tuite's defense team at Tuite's trial in an attempt to create reasonable doubt as to whether Tuite murdered Stephanie could not lead to the infliction of criminal penalties on the witness: Michael. Thus, Michael cannot predicate his Fifth Amendment claim on Tuite's use of Michael's statements at Tuite's trial.

Counselman v. Hitchcock, 142 U.S. 547, 12 S.Ct. 195, 35 L.Ed. 1110 (1892), cited by Michael, is not to the contrary. In *Counselman,* the Supreme Court was confronted with the issue of under what circumstances a witness may assert the Fifth Amendment privilege and refuse to provide testimony. The Court rejected the contention that "a witness is not entitled *to plead the privilege* of silence, except in a criminal case against himself. . . ." *Id.* at 562, 12 S.Ct. 195 (emphasis added). The Court explained:

> It is impossible that the meaning of the constitutional provision can only be that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to ensure that a person should not

> be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself he committed a crime.

Id. at 562, 12 S.Ct. 195. It is upon this language that Michael seizes; however, in *Counselman,* the issue was whether Counselman could be held in contempt for failing to answer questions posed by a grand jury on the ground that his answer would be incriminating, *i.e.* whether he could be punished for *asserting* the privilege, *not* whether *the use* of his compelled statements in a grand jury proceeding or in the criminal trial of another violates the Fifth Amendment. Thus, the Supreme Court's conclusion in *Counselman* that *the privilege* of refusing to testify and remaining silent may be *asserted* in a proceeding other than one's one criminal prosecution and that it violates the Fifth Amendment to punish one for *asserting* this privilege under such circumstances does not answer the question here: whether *the use* of compelled statements at another's trial is a Fifth Amendment violation cognizable in the context of a § 1983 action. *See United States v. Antelope,* 395 F.3d 1128, 1141 (9th Cir.2005) (explaining that "[c]ritical to the reasoning of all six justices [in *Chavez*] was the simple principle that the scope of the Fifth Amendment's efficacy is narrower when used as a sword in a civil suit than when used as a shield against criminal prosecution"); *Chavez,* 538 U.S. at 769, 123 S.Ct. 1994 (explaining that "contrary to the Ninth Circuit's view, mere coercion does not violate the text of the Self-Incrimination Clause *absent use* of the compelled

statements in a criminal case *against the witness*") (Thomas, J.) (emphasis added); *see also id.* at 770, 123 S.Ct. 1994 (explaining that although the Supreme Court has "permitted the Fifth Amendment's self-incrimination privilege to be *asserted* in noncriminal cases, that does not alter our conclusion that a violation of the constitutional *right* against self-incrimination occurs only if one has been compelled to be a *witness against himself in a criminal case*") (Thomas, J.) (internal citations omitted) (first and third emphases added).

Michael also contends that his statements were used at his own criminal trial because they were introduced into evidence during his pretrial motion proceedings as the subject of motions in limine. This court concludes that this argument is unavailing because the Fifth Amendment is only violated by the introduction of a statement at trial in the government's case-in-chief or in its rebuttal.

First, the point of a court holding a pretrial hearing to determine whether a defendant's statements were coerced, and therefore should be excluded as evidence at trial, is to ensure that the defendant's Fifth Amendment rights are protected. It would make little sense to conclude that a defendant's Fifth Amendment rights are violated by the introduction of compelled statements at a motion in limine hearing where the court holds that the statements are inadmissible at trial because they were compelled. Nor does it make sense to conclude that a defendant's Fifth Amendment rights are violated where his

statements are introduced at a motion in limine hearing and ruled admissible at trial but the trial never occurs.

Second, the Fifth Amendment ensures that one who is compelled to make statements does not suffer criminal penalties from use of the statement. *See Kastigar,* 406 U.S. at 453, 92 S.Ct. 1653. One does not suffer criminal penalties from use of a compelled statement at a motion in limine hearing, even if the court ultimately holds that the statement is admissible. One is only subjected to criminal penalties from use of a compelled statement if it is actually introduced by the government at the speaker's trial.

Finally, even if it can be said that the Fifth Amendment is violated by the introduction of coerced statements at a motion in limine hearing, defendants would be entitled to summary judgment. For reasons set forth in the court's previous order, defendants would not be the proximate cause of any such Fifth Amendment violation. *See Crowe,* 303 F.Supp.2d at 1091-92. Moreover, one need only read the numerous and varied opinions in *Chavez* to conclude that the law in this area is not clearly established.

Accordingly, the court grants the motion for summary judgment filed by defendants with respect to Michael's Fifth Amendment claim.

IV. Fourth Claim for Relief – Fourteenth Amendment Substantive Due Process Clause ("Shocks the Conscience")

Michael's claim

Defendants bring a motion for summary judgment as to Michael's claim for violation of the Fourteenth Amendment substantive due process clause. A review of Michael's opposition reveals that this claim is predicated upon the manner of his interrogation. In light of the Supreme Court's decision in *Chavez,* it is clear that a substantive due process claim may be predicated upon the manner of police interrogation.[15]

A. An Issue of Law for the Court

Although Michael contends that whether defendants' conduct "shocks the conscience" is an issue for the jury, he has failed to cite any case law in support

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[15] Four Justices in *Chavez* concluded that the Fourteenth Amendment substantive due process clause "would govern the inquiry" in cases involving "police torture or other abuse that results in a confession. . . ." 538 U.S. at 773, 123 S.Ct. 1994 (Thomas, J.). Although this plurality did not find that the Fourteenth Amendment substantive due process clause was violated under the facts of that case, the remaining five Justices voted to remand the case to the Ninth Circuit to address the defendant's due process claim based on the manner of his interrogation. Thus, it appears that the Supreme Court unanimously agrees that, under the right circumstances, the manner in which police interrogation is conducted may lead to a claim for violation of the Fourteenth Amendment substantive due process clause.

of his contention, and the court's own research reveals case law holding that this determination is an issue of law for the court. *See Hayes v. Faulkner County,* 388 F.3d 669, 674-5 (8th Cir.2004); *Armstrong v. Squadrito,* 152 F.3d 564, 581 (7th Cir.1998); *Benn v. Universal Health System, Inc.,* 371 F.3d 165, 174 (3d Cir.2004). Although the Ninth Circuit in *Onossian v. Block,* 175 F.3d 1169, 1172 (9th Cir.1999) stated in passing that "it is clear that no reasonable trier of fact could find that defendants' actions shock the conscience," there is no basis for drawing the conclusion from this passage that it is Ninth Circuit law that this is an issue of fact for the jury, where nothing in *Onossian* suggests that "[t]he issue was fairly presented to [the panel] and refined through the adversary process" and decided "after careful analysis." *United States v. Johnson,* 256 F.3d 895, 916 (9th Cir.2001) (*en banc*) (Kozinski, J., concurring); *see also Miranda B. v. Kitzhaber,* 328 F.3d 1181, 1186 (9th Cir.2003) (*per curiam*) ("'[W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit. . . .'") (quoting *Johnson,* 256 F.3d at 914) (Kozinski, J. concurring); *United States v. Brandon P.,* 387 F.3d 969, 974 (9th Cir.2004). Moreover, the Ninth Circuit has long held in criminal cases that whether police conduct has violated the due process clause is a question of law for the court, not an issue for the jury. *See United States v. Wylie,* 625 F.2d 1371, 1378 (9th Cir.1980) ("And finally, the defendants argue that an instruction on outrageous involvement should have

been submitted to the jury. It was entirely proper for the district court to deny this request. The question of the outrageous involvement of government agents is a question of law for the court."); *United States v. Ramirez,* 710 F.2d 535, 539 (9th Cir.1983) ("The existence of police misconduct that contravenes constitutional due process is a question of law."). Given, as will be discussed in greater detail *infra,* that the issue is whether defendants' conduct is shocking to the conscience in "a constitutional sense," *County of Sacramento v. Lewis,* 523 U.S. 833, 847, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998), it is appropriate for this court, not a jury, to make that determination. *See Armstrong,* 152 F.3d at 581 ("Viewed in the totality of the circumstances, does the defendants' conduct in depriving Armstrong of a constitutional right shock the conscience? Because this inquiry ultimately defines the parameters of the Fourteenth Amendment, we approach the subject as a question of law.").

Moreover, in any event, it is clear that to the extent that the court must reach the merits of Michael's claim as the first step in determining whether defendants are entitled to qualified immunity, the issue of whether defendants violated Michael's rights, *i.e.,* engaged in conduct that "shocks the conscience" in a constitutional sense, is an issue of law for the court in the first instance. *See Saucier,* 533 U.S. at 207, 121 S.Ct. 2151 (referring to the Supreme Court's "instruction to the district courts and courts of appeals to concentrate at the outset on the definition of the constitutional right and to

determine whether, on the facts alleged, a constitutional violation could be found").

B. Defendants' Questioning of Michael Does Not "Shock the Conscience" in the Constitutional Sense

In determining whether police conduct violates the Fourteenth Amendment substantive due process clause, the Ninth Circuit uses the "shocks the conscience" test. *See Fontana v. Haskin,* 262 F.3d 871, 882 n. 7 (9th Cir.2001) (citing *Lewis,* 523 U.S. at 846, 118 S.Ct. 1708). The Supreme Court has made it is clear that this standard requires more than that "private sentimentalism" is offended. *Rochin v. California,* 342 U.S. 165, 172, 72 S.Ct. 205, 96 L.Ed. 183 (1952). Instead, the inquiry focuses on whether the challenged conduct is "'shocking to the universal sense of justice.'" *Lewis,* 523 U.S. at 850, 118 S.Ct. 1708 (quoting *Betts v. Brady,* 316 U.S. 455, 462, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942)). In other words, the challenged conduct must be "'conscience shocking, *in a constitutional sense.*'" *Lewis,* 523 U.S. at 847, 118 S.Ct. 1708 (quoting *Collins v. City of Harker Heights,* 503 U.S. 115, 128, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992)) (emphasis added). Some courts have gone so far as to hold that "the ultimate standard for evaluating a substantive due process claim is whether the challenged government action 'shocks the conscience' of federal judges." *Ruiz v. McDonnell,* 299 F.3d 1173, 1183 (10th Cir.2002); *see also Cruz-Erazo v. Rivera-Montanez,* 212 F.3d 617, 622-623 (1st Cir.2000) ("The

question now before the Court is whether the particular conduct alleged by appellants in this case was so egregious that it can properly be said, under these circumstances, to shock the conscience. We find the question to be a close one, as the alleged facts seem to fall in between the extremes of conduct which have previously been found to shock or not to shock the judicial conscience.") (internal footnote omitted); *Uhlrig v. Harder,* 64 F.3d 567, 573 (10th Cir.1995) (reading the Supreme Court case of *Collins v. City of Harker Heights* as "explain[ing] that the standard for judging a substantive due process claim is whether the challenged government action would 'shock the conscience' of federal judges").

In the few cases in which it has applied a "shocks the conscience" standard, the Supreme Court has consistently focused on the brutality of conduct that it has found to shock the conscience.[16] *See Crowe,* 303 F.Supp.2d at 1096-7 (detailing Supreme Court case law on this point); *see also Braley v. City of Pontiac,* 906 F.2d 220, 226 (6th Cir.1990) ("Most cases alleging

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[16] Cases such as *Spano v. New York,* 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959) are not to the contrary. The issue in *Spano* was whether *the admission of a coerced confession at trial* was a violation of the defendant's Fourteenth Amendment right to due process. *See id.* at 315, 79 S.Ct. 1202 ("This is another in the long line of cases presenting the question whether a confession was properly *admitted into evidence* under the Fourteenth Amendment.") (emphasis added). *Spano* did not apply a "shocks the conscience" standard and did not hold that the police violate the Fourteenth Amendment substantive due process clause merely by procuring a coerced confession.

police conduct that shocks the conscience have involved allegations of excessive force or physical brutality."). For example, in the classic case of *Rochin,* the Supreme Court concluded that the conduct of the police shocked the conscience, and that the use of the evidence at trial violated the defendant's Fourteenth Amendment right to substantive due process,[17] where the police, who saw the defendant put something in his mouth when they entered his house, directed a doctor to force an emetic solution through a tube into the defendant's stomach against his will to obtain evidence after struggling unsuccessfully with the defendant to obtain the evidence from his mouth. The Supreme Court, which throughout its opinion focused on the physical brutality of the police conduct, noted that the methods by which the evidence was obtained were "bound to offend even the most hardened sensibilities" and were "too close to the rack and the screw to permit of constitutional differentiation." *Rochin,* 342 U.S. at 172, 72 S.Ct. 205.

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[17] Although the *Rochin* court did not speak specifically in terms of "substantive" due process, it is nonetheless understood that the *Rochin* decision was based in substantive due process law. *See Hammer v. Gross,* 884 F.2d 1200, 1203 (9th Cir.1989). Interestingly, however, the Supreme Court has explained that "*Rochin,* of course, was decided long before *Graham v. Connor* (and *Mapp v. Ohio*), and today would be treated under the Fourth Amendment, albeit with the same result." *Lewis,* 523 U.S. at 850, 118 S.Ct. 1708.

In contrast, in *Breithaupt v. Abram,* 352 U.S. 432, 77 S.Ct. 408, 1 L.Ed.2d 448 (1957), the Supreme Court rejected the defendant's claim that his conviction for involuntary manslaughter arising out of a vehicular collision violated the substantive due process clause because at trial the government introduced blood evidence that was seized from him by use of a needle while he was unconscious. The Court explained that the distinction between that case and *Rochin* was that "there is nothing 'brutal' or 'offensive' in the taking of a sample of blood when done, as in this case, under the protective eye of a physician." *Id.* at 435, 77 S.Ct. 408. The Court went on to explain that "[t]his is not to say that the indiscriminate taking of blood under different conditions or by those not competent to do so may not amount to such 'brutality' as would come under the *Rochin* rule." *Id.* at 437-38, 77 S.Ct. 408.

Similarly, in *Irvine v. People of State of California,* 347 U.S. 128, 74 S.Ct. 381, 98 L.Ed. 561 (1954), the defendant sought to invalidate his conviction on the ground that, while he was away, the police had a locksmith make a key to his house and then entered and installed a microphone in the house. The Court declined the defendant's attempt to "bring [his] case under the sway of" *Rochin* because *Rochin* "presented an element totally lacking here-*coercion . . . applied by a physical assault upon his person* to compel submission to the use of a stomach pump." *Id.* at 133, 74 S.Ct. 381 (emphasis added).

Most recently in *Chavez,* the Supreme Court again highlighted the fact that the focus of a Fourteenth Amendment substantive due process analysis is the brutality of the police conduct. For example, a plurality of four Justices explained that the Fourteenth Amendment substantive due process clause is applicable in cases involving "*police torture or other abuse* that results in a confession," 538 U.S. at 773, 123 S.Ct. 1994 (Thomas, J.) (emphasis added), and that "[c]onvictions based on evidence obtained by methods that are 'so brutal and so offensive to human dignity' that they 'shoc[k] the conscience' violate the Due Process Clause." *Id.* (quoting *Rochin,* 342 U.S. at 172, 72 S.Ct. 205). Similarly, Justice Stevens concluded that "brutal" police conduct that is "the functional equivalent of an attempt to obtain an involuntary confession from a prisoner by tortuous methods" constitutes a due process violation as a matter of law. *Chavez,* 538 U.S. at at 783-4, 123 S.Ct. 1994 (Stevens, J., concurring in part and dissenting in part).

As the Supreme Court explained in *Lewis,* "[d]eliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking." 523 U.S. at 850, 118 S.Ct. 1708. Having reviewed the audiotapes and videotapes of Michael's interviews and interrogations in their entirety as well as the transcripts thereof, and having considered the circumstances

surrounding the interrogations, the court concludes that defendants' behavior during the interviews and interrogations, although far from laudable, was not "so egregious, so outrageous, that it may fairly be said" to "shock the conscience" in "a constitutional sense." *Fontana,* 262 F.3d at 882 n. 7; *Lewis,* 523 U.S. at 847, 118 S.Ct. 1708.

Certainly, it cannot be forgotten that Michael was a juvenile at the time of the interrogations, that his sister had just been killed, that he was suffering from a cold, and that at least one of the interrogations was quite long. However, the interrogations were not sufficiently egregious or outrageous to be "shocking to the universal sense of justice" in the constitutional sense. The facts surrounding the questioning of Michael are quite distinct from the facts surrounding the interrogation in *Chavez.* As in *Rochin,* the police conduct in *Chavez* was "brutal." *See Chavez,* 538 U.S. at 784, 123 S.Ct. 1994 (Stevens, J., concurring in part and dissenting in part). "The District Court found that Martinez 'had been shot in the face, both eyes were injured; he was screaming in pain, and coming in and out of consciousness while being repeatedly questioned about details of the encounter with the police.'" *Id.* at 798, 123 S.Ct. 1994 (Kennedy, J., concurring in part and dissenting in part). Justice Kennedy, joined by Justices Stevens and Ginsburg, concluded that the record supported a finding that the defendant police officer intended to exploit Martinez's physical pain and that Martinez "thought his treatment would be delayed, and thus his pain and

condition worsened, by refusal to answer questions." *Id.* at 797, 123 S.Ct. 1994.

Here, while not necessarily pleasant, Michael's questioning lacked such a brutal nature. Defendants did not yell at Michael or even raise their voices. Michael was given food and water and bathroom breaks, even if not always immediately. Although defendants employed a "good cop/bad cop" approach during some of the interviews, such a manner of interrogation is relatively common and certainly not shocking, even when juveniles are involved. Moreover, although defendants continued to push Michael to answer questions after he insisted that he did not remember anything, on this record such conduct simply is not shocking. Although defendants also lied to Michael at times, for example, by stating that Michael's hairs were found in Stephanie's hand, the Ninth Circuit has concluded that such conduct is not necessarily coercive. *See Pollard v. Galaza,* 290 F.3d 1030, 1034 (9th Cir.2002) ("[W]e have explained that misrepresentations made by law enforcement in obtaining a statement, while reprehensible, does not necessarily constitute coercive conduct."); *see also United States v. Orso,* 266 F.3d 1030, 1039 (9th Cir.2001) (*en banc*) (same). If not coercive, such conduct certainly cannot be deemed shocking. This conclusion is not altered here by the fact that Michael was a juvenile, particularly given that Michael was, by all accounts, an intelligent juvenile who enjoyed sophisticated computer and fantasy games.

Similarly, it is not outrageous in the constitutional sense that defendants attempted to extract confessions from Michael by telling him that he could get treatment rather than jail if he confessed given that the Ninth Circuit has held that such representations do not even rise to the level of being coercive. *See Cunningham v. City of Wenatchee,* 345 F.3d 802, 810 (9th Cir.2003) ("Perez's suggestion that Cunningham's cooperation could lead to treatment rather than prison is also not coercive.").

Moreover, although Michael appears quite emotional during much of the questioning, the use of questions that elicit an emotional response does not necessarily transform the interrogation into one that "shocks the conscience." *Cf. Id.* ("Perez's questions may have unsettled Cunningham, but mere emotionalism and confusion do not invalidate confessions."). In evaluating whether Michael's emotionalism is evidence of a reaction to the type of "brutal" police conduct that would support a substantive due process violation, the court finds somewhat significant Michael's abrupt change in demeanor prior to his final interrogation. Although Michael appeared upset during much of his questioning, during his last interrogation, Michael calmly and cooly made chilling statements regarding his hatred of Stephanie, and a viewer of this portion of the videotape could certainly question the sincerity of the emotion displayed during the earlier interrogations.

The court notes that the parties dispute the significance of the fact that Michael told defendants

toward the end of his interrogation that they had been "nice" to him. Defendants contend that this is evidence of the fact that the manner of the interrogation was not shocking to the conscience in the constitutional sense, while Michael contends that this statement is consistent with Stockholm Syndrome, which Michael contends is a defense mechanism by which an individual unites with his attackers.

For the record, the diagnostic label of Stockholm Syndrome is counsel's, not Dr. Colarusso's. Moreover, a review of the report of Dr. Colarusso, a psychiatrist, reveals that he does not specifically address the question of why Michael would say that defendants were nice to him. However, in any event, regardless of the motivation for Michael's statement that defendants were nice to him, the court concludes that such statement does little to inform the analysis of whether the interrogations were "shocking to the conscience" in a constitutional sense.

Similarly, the court notes that Michael has presented evidence in the form of (1) a declaration by a lay person, Margaret Hublar, who has viewed the videotapes of his interrogations and opined that defendants' conduct shocked her conscience, *see* Crowe Family's Exhibit 18F, and (2) a report by Dr. Colarusso, who opines that defendants' conduct during the interrogations constituted "emotional child abuse." *See* Michael's Exhibit 60 at 12. Such evidence does not suffice to defeat summary judgment.

Again, whether defendant's behavior "shocks the conscience" for Fourteenth Amendment purposes is an issue of law for the court. *Hayes,* 388 F.3d at 674-75; *Armstrong,* 152 F.3d at 581; *Benn,* 371 F.3d at 174. The relevant inquiry is whether defendants' conduct shocks "'the universal sense of justice,'" *Lewis,* 523 U.S. at 850, 118 S.Ct. 1708 (quoting *Betts,* 316 U.S. at 462, 62 S.Ct. 1252), not whether it offends the "private sentimentalism" of a lay person such as Ms. Hublar or a retained expert such as Dr. Colarusso. *Rochin,* 342 U.S. at 172, 72 S.Ct. 205. Moreover, defendants' conduct must shock the conscience "'in a constitutional sense.'" *Lewis,* 523 U.S. at 847, 118 S.Ct. 1708 (quoting *Collins,* 503 U.S. at 128, 112 S.Ct. 1061). In other words, defendant's conduct must be viewed through a legal and constitutional prism that has been narrowly crafted by the Supreme Court, not through the very different prisms of a lay person and a psychiatrist. Thus, neither Ms. Hublar nor Dr. Colarusso are in a position to opine as to whether defendants' conduct shocks the conscience for purposes of the Fourteenth Amendment, and their declarations do not suffice to defeat summary judgment.

Although the Ninth Circuit has not always required the type of physical brutality identified by the Supreme Court as necessary for a substantive due process claim, it is clear that even under Ninth Circuit case law, Michael must demonstrate "something more" than that defendants' conduct produced

involuntary statements on his part.[18] Michael's reliance on *Cooper v. Dupnik,* 963 F.2d 1220 (9th Cir.1992) (en banc) as authority to the contrary is simply unavailing. In fact, a careful reading of *Cooper* reinforces the conclusion that the mere act of coercing a confession does not arise to the level of conduct that "shocks the conscience." In *Cooper,* the defendants did not simply coerce a confession from a suspect. Rather, as they freely admitted in their depositions, they subjected the suspect, Cooper, to a method of interrogation that they had specifically devised to compel a confession and to hinder Cooper's ability to defend himself at trial, which method involved ignoring Cooper's invocation of the right to remain silent and the right to counsel. As the Ninth Circuit explained:

> *The core of their plan was to ignore the suspect's Constitutional right to remain silent as well as any request he might make to speak with an attorney in connection therewith, to hold the suspect incommunicado, and to pressure and interrogate him until he confessed.* Although the officers knew any confession thus generated would not be admissible in evidence in a prosecutor's case in chief, they hoped it would be admissible

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[18] The wisdom of such a requirement is obvious. One can only imagine the Pandora's box that would be opened if a substantive due process claim could be predicated upon the mere coercion of a confession without use of the confession at trial or without additional "aggravating circumstances" such as were present in *Cooper,* as discussed *infra.*

> for purposes of impeachment if the suspect ever went to trial. *They expected that the confession would prevent the suspect from testifying he was innocent, and that it would hinder any possible insanity defense.*

Id. at 1224 (emphasis added). In accordance with the plan, the police officers ignored Cooper's statement of unwillingness to talk as well as his request to consult with an attorney. *See id.* at 1231.

As in this case, Cooper was not actually tried for the crime for which he was arrested and interrogated, and Cooper sued the police pursuant to § 1983 alleging, *inter alia,* that the defendants' conduct violated the Fourteenth Amendment substantive due process clause under a "shocks the conscience" theory. In concluding that the police officer's behavior "shocked the conscience," the Ninth Circuit concluded that the "primary aggravating circumstance" was the police officers' "purpose of making it difficult, if not impossible, for a charged suspect to take the stand in his own defense. . . ." *Id.* at 1249. The court explained that the defendants' "purpose was not just to be able to impeach him if he took the stand and lied, but to keep him off the stand altogether." *Id.* The court went on to explain that "[t]he unlawful nature of this aspect of the plan is exacerbated by the plan's second purpose of curtailing an accused suspect's right to present an insanity defense." *Id.* at 1250. Thus, the "shocking" conduct in *Cooper* was not the mere coercion of a confession but, rather, the coercion of a confession pursuant to a conscious and premeditated plan to

ignore the suspect's invocation of his Fifth and Sixth Amendment rights so as to compel a confession, which would then hinder the suspect's ability to present a defense at trial. These "aggravating circumstances" noted by the Ninth Circuit in *Cooper* are simply not present here. *See id.* at 1249.

In summary, the manner in which Michael was interrogated does not approach the type of police conduct that has been found in *Rochin* and other cases to be "shocking" in the constitutional sense and to, therefore, violate the Fourteenth Amendment substantive due process clause.

C. Qualified Immunity: the Second Step of the Analysis

Even if the court were to determine that defendants' conduct did violate substantive due process, defendants would still be entitled to qualified immunity because it would not have been clear to a reasonable officer that the manner in which Michael's interrogations were conducted amounted to a violation of his Fourteenth Amendment right to substantive due process given that the interrogations lacked the brutality that has previously marked the police conduct found by the Supreme Court to be "shocking to the conscience." Although Michael contends that it was clearly established in *Rochin* that "[p]olice conduct which 'shocks the conscience' constitutes a violation of substantive due process" and that it was clearly established in *Cooper v. Dupnik* "that

obtaining involuntary statements through psychological coercion violated the due process clause of the Fourteenth Amendment," Michael's Opposition at 82:24-28, Michael's reliance on these two cases is unavailing here.

Again, as explained by the Supreme Court most recently in *Brosseau,* in a case such as this, a plaintiff cannot defeat a summary judgment motion on qualified immunity grounds simply by pointing to case law clearly establishing a general proposition such as the proposition that police conduct that shocks the conscience violates substantive due process. *See Brosseau,* ___ U.S. at ___, 125 S.Ct. at 599; *see also Saucier,* 533 U.S. at 202, 121 S.Ct. 2151. Rather, the inquiry is whether it was *clearly established that it shocks the conscience,* and therefore violates substantive due process, *to interrogate a juvenile in the manner in which Michael was interrogated.* The court concludes that a reasonable officer in defendants' position would not necessarily have known that the police conduct here would meet that standard.

Plaintiffs have failed to identify any relevant case law addressing the issue of when the interrogation of a juvenile crosses the constitutional line and "shocks the conscience" for substantive due process purposes. Nor has the court's attention been directed to any case, other than *Cooper,* involving interrogations in the adult which was in existence at the time of Michael's interrogation and therefore would have been available to guide defendants' action. As noted, the interrogation in *Cooper* employed different means

(blatantly ignoring the defendant's invocation of the right to remain silent and the right to counsel) in order to accomplish different ends (to extract a confession which would keep the defendant off the stand and which preclude the defendant from presenting an insanity defense at trial), and the Ninth Circuit in *Cooper* focused on these means and ends in reaching its conclusion that the police officer's conduct "shocked the conscience." *See Cooper,* 963 F.2d at 1249, 1250 (explaining that the "primary aggravating circumstances" were the defendants' purposes of keeping Cooper from testifying in his own defense and precluding him from presenting an insanity defense and concluding that "[w]hat made these purposes unacceptable" was "the unconstitutional methods chosen to pursue them," which included the disregard of Cooper's invocation of his right to remain silent and his right to counsel). Because the aggravating circumstances in *Cooper* are simply not present here, the facts of *Cooper* would not necessarily put a reasonable officer on notice that the conduct in the present case was so egregious as to "shock the conscience" in a constitutional sense.

Moreover, although *Chavez* had not been decided at the time of Michael's interrogation, even if it had, it would not have clearly established that the manner of Michael's interrogation violated substantive due process. First, it should be noted that four Justices in *Chavez* concluded that the questioning of Martinez, the plaintiff in that case, did not "shock the conscience" despite the fact that (1) Martinez was clearly

suffering from physical pain as well as mental anguish at the time;[19] (2) three different Justices concluded that the police officer exploited Martinez's pain and suffering "with the purpose and intent of securing an incriminating statement," *Chavez,* 538 U.S. at 797, 123 S.Ct. 1994 (Kennedy, J.); and (3) Justice Stevens characterized the questioning as "brutal" and "the functional equivalent of an attempt to obtain an involuntary confession from a prisoner by tortuous methods." *Chavez,* 538 U.S. at 783-4, 123 S.Ct. 1994 (Stevens, J., concurring in part and dissenting in part). Because the police conduct in the present case was far less egregious than the conduct in *Chavez,* and because four Supreme Court justices in *Chavez* concluded that the conduct in *Chavez* was not shocking to the conscience, one must conclude that, even after *Chavez,* a reasonable officer could believe that the conduct in the present case did not shock the conscience.

D. Conclusion

Defendants are entitled to summary judgment with respect to Michael Crowe's claim that the manner in which defendants conducted his questioning violated the substantive due process clause of the

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[19] As noted by Justice Kennedy, Martinez "had been shot in the face, both eyes were injured; he was screaming in pain, and coming in and out of consciousness while being repeatedly questioned. . . ." *Chavez,* 538 U.S. at 798, 123 S.Ct. 1994

Fourteenth Amendment under a "shocks the conscience" theory.

The Crowe Family's Claims

The entire Crowe family brings a claim for violation of the Fourteenth Amendment based on their belief that defendants posted the strip search photographs taken of the family on a widely visible bulletin board in the police station. Assuming, without deciding, that such conduct could support a Fourteenth Amendment claim, this claim must nonetheless fail because the Crowes have failed to come forth with evidence from which a factfinder could find that pictures of the Crowes were in fact posted on a bulletin board in the police station. The only evidence that plaintiffs have presented is that they saw pictures similar to theirs posted and, therefore, they assumed that theirs were posted at some point. Such assumptions are not sufficient to support the denial of defendants' motion, and the motion is granted with respect to this claim.

In addition, it appears that Cheryl and Stephen[20] are bringing a claim based upon the drawing of a gun in their presence after they attempted to leave the police station through a secured door. Taking the evidence in the light most favorable to plaintiffs, as

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[20] Neither the Shannon, Michael, nor Judith Kennedy were present during this alleged incident. Therefore, they cannot bring a claim arising out of this incident.

Stephen was about to open the door, a large number of police officers, including defendant Wrisley, appeared. Defendant Wrisley had his gun drawn and pointed at Stephen, and Wrisley yelled at Stephen "This is a secure area. Get back upstairs. Now." Omnibus Decl. of Stephen Crowe ¶ 20 (Exhibit 44, Michael's Exhibits). The other officers had their hands on their guns but did not have them drawn. *Id.*

Factors to consider in evaluating a substantive due process excessive force claim include the need for force, the amount of force used, the extent of injury inflicted, and whether force "was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Carr v. Tatangelo,* 338 F.3d 1259, 1271 (11th Cir.2003). An officer is entitled to qualified immunity if, considering these factors, a reasonable officer could have believed that the use of force under the circumstances was lawful. *See id.*

Here, although it is somewhat questionable whether defendant Wrisley needed to draw his gun, no actual force was used, and no injury was inflicted. Moreover, it appears that the force was applied in an effort to maintain security and not for the purpose of causing harm. Under these facts, defendant Wrisley's conduct toward Cheryl and Stephen is not shocking in the constitutional sense.

Moreover, even if defendant Wrisley did violate Cheryl and Stephen's substantive due process rights, plaintiffs have failed to cite any case law suggesting

that the threatened use of force under these facts violates the Fourteenth Amendment substantive due process clause, and such a violation is not obvious. Thus, a reasonable officer could have believed that the minimal use of force employed by defendant Wrisley was lawful.

Accordingly, to the extent that Cheryl and Stephen are raising such a claim, defendants' motion for summary judgment is granted as to it.

V. Fifth Claim for Relief – Fourteenth Amendment Substantive Due Process (Deprivation of Familial Companionship)

Arising Out of Michael's Arrest

A substantive due process claim for deprivation of the right to familial companionship is recognized where the deprivation is the result of "unwarranted" governmental interference. *Smith v. City of Fontana,* 818 F.2d 1411, 1418 (9th Cir.1987), *overruled on other grounds by Hodgers-Durgin v. de la Vina,* 199 F.3d 1037 (1999). As discussed *supra,* Michael's arrest was supported by probable cause. Thus, the state's interference with the Crowes' familial relationship as the result of Michael's arrest was not "unwarranted." *See Schaefer v. Goch,* 153 F.3d 793, 799 (7th Cir.1998) ("Because we have concluded that Sergeant Goch did not violate Kathy Nislowski's rights under the Constitution, her parents' claims based on the loss of her society and companionship necessarily fail as well.").

Thus defendants are entitled to summary judgment with respect to this claim.

Moreover, as detailed in § II.D, *supra,* even if it were determined that Michael's arrest was not supported by probable cause, a reasonable officer could have believed that it was supported by probable cause. Therefore, defendants would be entitled to qualified immunity under the second prong of the *Saucier* test because a reasonable officer could have believed that Michael's arrest constituted a warranted interference with the right of companionship.

Accordingly, defendants are entitled to summary judgment with respect to this claim.

Arising Out of Michael's and Shannon's Placement in Protective Custody

Defendants also seek summary judgment to the extent this Fourteenth Amendment claim is predicated upon the placement of Michael and Shannon in protective custody at the Polinsky Children's Center prior to Michael's arrest. Defendants contend that the interference with companionship was warranted pursuant to California's Welfare and Institutions Code § 305(a), which provides that a police officer may, without a warrant, take a child into temporary custody "[w]hen the officer has reasonable cause for believing that the minor is a person described in Section 300, and, in addition, that the minor has an immediate need for medical care, or the minor is in immediate danger of physical or sexual abuse, or the

physical environment or the fact that the child is left unattended poses an immediate threat to the child's health or safety." Defendants have failed to demonstrate that the placement of Michael and Shannon at the Polinsky Children's Center was warranted under this provision.

First, defendants have failed to demonstrate that there was reasonable cause for believing that Michael or Shannon were in immediate danger of physical abuse. Moreover, defendants have failed to demonstrate that there was reasonable cause for believing that they were minors within the meaning of § 300, as there was not reasonable cause for believing that there was "a substantial risk that the child will suffer[ ] serious physical harm inflicted nonaccidentally upon the child by the child's parent or guardian." Wel. & Inst. Code § 300(a). Moreover, there was no basis for concluding that Cheryl and Stephen Crowe caused Stephanie's death through abuse or neglect. *See* Cal. Welf. & Inst. Code § 300(f).

Moreover, on these facts, no reasonable police officer could have believed there was reasonable cause for Michael's and Shannon's placement in protective custody. Accordingly, defendant's motion is denied with respect to this claim.

VII. Ninth Claim for Relief – False Arrest/False Imprisonment

Michael's Claim

Defendants seek summary judgment on Michael's claim for false arrest/false imprisonment. Under California law, no cause of action may be brought against a police officer for false arrest or false imprisonment arising out of any arrest when "[t]he arrest was lawful, or the peace officer, at the time of the arrest, had reasonable cause to believe the arrest was lawful." California Penal Code § 847(b)(1). Penal Code § 836(a)(3) provides that a warrantless arrest is lawful when a police officer has "probable cause to believe that the person to be arrested has committed a felony, whether or not a felony, in fact, has been committed." As is the case with federal law, California law provides that "the court must look to the facts known to the peace officer at the time of the arrest" in determining whether there is probable cause for a warrantless arrest. *Giannis v. City and County of San Francisco,* 78 Cal.App.3d 219, 224, 144 Cal.Rptr. 145 (1978). "The issue of whether an arrest was made with reasonable cause is an issue of law to be decided by the court." *Id.* at 225, 144 Cal.Rptr. 145.

For the reasons set forth in section § II.D, *supra,* defendants had reasonable cause to believe that Michael's arrest was lawful. Therefore, California Penal Code § 847 shields defendants from liability for Michael's arrest. Accordingly, defendants are entitled

to summary judgment with respect to Michael's claim for false arrest/false imprisonment.

VI. Eleventh and Twelfth Claims for Relief – Intentional and Negligent Infliction of Emotional Distress

All Plaintiffs

Defendants seek summary judgment with respect to the claims of Michael and the rest of the Crowe family for intentional and negligent infliction of emotional distress. It is impossible from a review of the complaint to determine upon which acts of defendants these claims are predicated. Moreover, in their oppositions, neither Michael nor the rest of the Crowe family illuminates the basis of their claims and neither sets forth arguments explaining how the evidence presented is sufficient to withstand a motion for summary judgment directed at these claims. Accordingly, the court finds that Michael and the rest of the Crowe family have failed to meet their summary judgment burden, and defendants' motion is granted with respect to these claims.

CONCLUSION

In the ensuing years, since that fateful and tragic night in January of 1998, there has been a fundamental change in the law, a change that affected the outcome of these motions. As this court noted in its previous order, "[a]t the time of the boys' interrogations, Ninth Circuit case law held that a Fifth

Amendment violation occurs at the moment police officers coerce a confession from a suspect." *Crowe,* 303 F.Supp.2d at 1086. However, after *Chavez v. Martinez,* 538 U.S. 760, 123 S.Ct. 1994, 155 L.Ed.2d 984 (2003), "it is clear that a § 1983 plaintiff cannot succeed on a Fifth Amendment self-incrimination claims predicated solely upon coercive police interrogation resulting in an involuntary confession." *Crowe,* 303 F.Supp.2d at 1098. Rather, in order for Michael to have a viable Fifth Amendment claim against defendants, Michael must demonstrate that his coerced statements were used against him in a criminal trial, which he is unable to do. This sea change in the law undermined and brought to naught the Fifth Amendment self-incrimination claims of Michael and the other boys, which claims were originally, in many ways, the heart of this lawsuit. It is because of this change in the law that the motion for summary judgment is granted as to Michael's Fifth Amendment self-incrimination claim.

As for Michael's substantive due process claim, although defendants should not be proud of their conduct, defendants' conduct did not rise to the level of being shocking to the conscience in the constitutional sense. Accordingly, the motion for summary judgment is granted as to Michael's substantive due process claim.

As for Michael's Fourth Amendment claim arising out of his arrest, while the conviction of Tuite for Stephanie's homicide might appear, to those unversed in the law, to lend credence to plaintiffs' arguments

that Michael's arrest was not supported by probable cause, Tuite's conviction, which occurred many years after the murder and Michael's arrest, does not, under the law, affect the determination as to whether Michael's Fourth Amendment rights were violated in 1998. *See Graham,* 490 U.S. at 396, 109 S.Ct. 1865 ("The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested. . . ."). The issue is whether there was probable cause to arrest Michael, which requires consideration of the facts that defendants had in their possession at the time of Michael's arrest. *See Beck,* 379 U.S. at 96, 85 S.Ct. 223. Because there was probable cause to arrest Michael given the facts in defendants' possession at that time, the motion for summary judgment is granted with respect to this claim. Moreover, because there was probable cause to arrest Michael, the motion for summary judgment is granted with respect to Michael's claim for false arrest/false imprisonment.

As for the Crowes' Fourth Amendment claims arising out of the strip searches, the motion is granted as to Michael's claim but denied as to the claims brought by the rest of the family. Similarly, the motion for summary judgment is granted with respect to Michael's Fourth Amendment claim based on the seizure of his hair and blood, but denied with respect to Cheryl and Stephen's Fourth Amendment claim based on the seizure of their hair and blood.

The motion for summary judgment is granted with respect to the Crowes' Fourth Amendment claim arising out of the search of their residence.

The motion for summary judgment is denied as to the Cheryl and Stephen's Fourth Amendment claim arising out of their detention at the police station.

The motion for summary judgment is granted as to the Crowe family's Fourteenth Amendment substantive due process claims based upon the posting of photographs, as there is no evidence that the photographs were posted. The motion for summary judgment is also granted as to Cheryl and Stephen's Fourteenth Amendment substantive due process claims based upon the pointing of a gun at Stephen.

The motion for summary judgment is denied as to the substantive due process claim for deprivation of familial companionship arising out of Michael and Shannon's placement in protective custody but is granted to the extent that claim arises out of Michael's arrest.

In addition, the motion for summary judgment is granted as to the state law claims for intentional and negligent infliction of emotional distress.

Finally, although one could certainly criticize the manner in which the investigation of Stephanie's murder was conducted, it must be remembered that the *sine qua non* of a § 1983 action is whether there has been a constitutional violation. It is not enough

that the police may have been heavy-handed, mendacious and unprofessional. *Cf. Atwater v. City of Lago Vista,* 532 U.S. 318, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001). The acts of the police officers must be found to be in violation of the Constitution. While the court may not approve and condone the methods that the police employed, the court's personal predilections are necessarily irrelevant in a constitutional analysis.

IT IS SO ORDERED.

Michael CROWE, et al., Plaintiffs,

v.

COUNTY OF SAN DIEGO, et al., Defendants.

And Related Actions

No. 99CV0241 R(RBB).

United States District Court,
S.D. California.

Feb. 17, 2004.

Milton J Silverman, Jr., Law Offices of Milton Silverman, San Diego, CA, counsel for Crowe plaintiffs.

Robert J Francavilla, Casey, Gerry, Reed and Schenk, San Diego, CA, counsel for Treadway plaintiffs.

Dennis A Schoville, Louis Arnell, Schoville and Arnell, San Diego, CA, counsel for Houser plaintiffs.

Mark A Waggoner, City of Escondido, Office of the City Attorney, Escondido, CA, counsel for Escondido defendants.

George W Brewster, Jr., County of San Diego, Office of County Counsel, San Diego, CA, counsel for defendant Stephan.

Diana L Field, Ferguson, Praet and Sherman, Santa Ana, CA, counsel for defendants McDonough and the City of Oceanside.

Kenneth H Moreno, Scott Loeding, Murchison and Cumming, San Diego, CA, counsel for defendant Blum.

Richard J Schneider, Golnar Fozi, Daley and Heft, Solana Beach, CA, counsel for City of Escondido.

ORDER RE: SUMMARY JUDGMENT MOTIONS

RHOADES, District Judge.

Death is always and under all circumstances a tragedy, for if it is not, then it means that life itself has become one.

– Letter from Theodore Roosevelt to Cecil Spring-Rice (March 12, 1900)[1]

This tragic story centers around the investigation into the death of young Stephanie Crowe in January 1998. Stephanie's murder was investigated by the Escondido Police Department. The investigation of her death initially led to the arrest and indictment of Stephanie's brother, Michael Crowe, and his two friends, Michael Treadway and Aaron Houser (collectively, "the boys"), all juveniles at the time. Prior to the boys' trial, potentially-exculpatory evidence was discovered which resulted in the District Attorney dropping the charges against the boys without

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[1] BARTLETT'S FAMILIAR QUOTATIONS 847 (John Bartlett ed., Little, Brown & Co.1968) (1855).

prejudice. Currently, a man named Richard Tuite is on trial for Stephanie's murder.

FACTUAL BACKGROUND

On the night of January 20, 1998, the police received phone calls that Tuite, a transient, was bothering people in the vicinity of the Crowe residence. Witnesses testified at their depositions in this case that the man they saw appeared drunk or high. *See* Sharon Thomas Deposition Transcript ("DT") p. 16:22-24 (Exhibit 2, Plaintiffs' Notice of Lodgment ("NOL") in Support of Plaintiffs' Opposition to Defendant City of Escondido's Motion for Summary Judgment ("MSJ")); Sheldon Homa DT p. 17:12-15 (Exhibit 6, Plaintiffs' NOL in Support of Plaintiffs' Opposition to Defendant City of Escondido's MSJ). One witness heard Tuite yell "I'm going to kill you you fucking bitch." Sharon Thomas DT p. 18:1-6. Another witness saw Tuite spinning around in circles. *See* Dawn Homa DT p. 51:11-52:2 (Exhibit 7, Plaintiffs' NOL in Support of Plaintiffs' Opposition to Defendant City of Escondido's MSJ).

Between 7:00 and 8:00 p.m. that night, Tuite entered one house after the occupant, Dannette Mogelinski, mistaking his knock for that of a neighbor, invited him in. *See* Dannette Mogelinski DT p. 27:27-28:13 (Exhibit 3, Plaintiffs' NOL in Support of Plaintiffs' Opposition to Defendant City of Escondido's MSJ). Tuite repeatedly asked for Tracy. Mogelinski said she did not know Tracy. Tuite left but

then opened the door and again asked for Tracy. Mogelinski again said she did not know Tracy, and Tuite left. *See id.* pp. 32:12-33:28.

Around 9:28 p.m., Gary West, a neighbor of the Crowes, called police to report a transient who had knocked on his door and said he was looking for a girl. *See* Exhibit 11, Plaintiffs' NOL in Support of Plaintiffs' Opposition to Defendant City of Escondido's MSJ. Escondido police officer Scott Walters, not a defendant in this action, was dispatched to the area. While investigating this call, Officer Walters drove up to the Crowe house. As he explained in his deposition in this case:

> There was a motion light above the garage door that turned on when I drove up. The door that was next to the garage door was open. And I could see inside. There were lights inside the house. Absolutely nothing unusual at the house. And the door closed as I pulled up. I couldn't see who was closing it.

Scott Walters DT p. 49:20-28 (Exhibit 15, Plaintiffs' NOL in Support of Plaintiffs' Opposition to Defendant City of Escondido's MSJ). Officer Walters left the Crowe house and indicated in his log that the transient was "gone on arrival." *See id.* p. 50:3-5. This was some time before 10:00 p.m.

Stephanie Crowe was found dead by her grandmother, Judith Kennedy around 6:30 a.m. on January 21, 1998. An autopsy determined that Stephanie was stabbed numerous times with a knife with a 5-6 inch

blade. It is undisputed on this record that Stephanie died between 10:00 and 11:00 p.m. on January 20, 1998. *See* Plaintiffs' Separate Statement of Undisputed Material Facts in Opposition to Defendant City of Escondido's MSJ, Fact 17. Paramedics John Peters and Steve Mandich, not defendants in this action, were the first to respond to the 911 call. Detective Barry Sweeney, a detective with the Escondido Police Department and a defendant in this action, arrived on the scene soon after.

Police questioned all of the members of the Crowe household. Michael Crowe was questioned several times. Before the first questioning of Michael Crowe, Michael was advised of his *Miranda* rights. During this questioning, Michael told Detective Mark Wrisley, a defendant in this action, and Detective Phillip Han, who is not a defendant in this action, that he had gotten up at 4:30 a.m. that morning with a headache. *See* Transcript of Police Interview of Michael Crowe Taken at The Polinsky Center, January 22, 1998 pp. 21:23-22:10. He had turned on his television for light and had walked to the kitchen, where he took some Tylenol. *See id.* pp. 22:3-23:12. Michael stated that he was in the kitchen for approximately 15 minutes. *See id.* p. 23:15-17. He stated that when he was in the hallway he could see that Stephanie's door was closed, as were the other doors. *See id.* pp. 22:28-23:5; 24:23-28. By defendants' account, the statement that Stephanie's door was closed was suspicious because by 4:30 a.m. Stephanie was dead in the doorway of her bedroom with the door

open. *See* Phillip Anderson DT pp. 132:26-133:8 (Exhibit 21, Plaintiffs' NOL in Support of Plaintiffs' Opposition to Defendant City of Escondido's MSJ). During this interview, Michael Crowe also stated that Joshua Treadway was his best friend.

On January 22, 1998, Escondido Police Detectives Lanigan and Naranjo, not defendants in this case, went to the Treadway residence to speak with Joshua Treadway. The detectives saw a knife in plain view on top of a couch in the living room. *See* Lanigan DT pp. 27:13-28:12 (Exhibit E, attached to Memorandum of Points and Authorities in Support of Escondido Defendants' MSJ or in the Alternative Partial Summary Judgment, of the Claims Asserted by the Treadway Plaintiffs). When Joshua was asked who owned the knife, he said it was his brother's; however, when his brother was questioned about the knife, he stated that it belonged to Joshua.[2] *See id.* pp. 28:13-29:27; 33:4-35:20.

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[2] There is no genuine dispute that the boys told conflicting stories. Although in the Treadways' Response to Escondido Defendants' Separate Statement of Undisputed Facts the Treadway plaintiffs state that they dispute that the boys told conflicting stories, rather than citing to evidence which demonstrates a genuine issue of fact as to whether Josh and Zachary each said that the knife belonged to the other, the Treadway plaintiffs cite generally to their Separate Statement of Facts in Opposition to Escondido Defendants' MSJ. The court has read the Treadway Plaintiffs' Separate Statement of Facts in its entirely, and there is no evidence or reference to evidence in there that would create a genuine issue of fact with respect to this point.

After being questioned two additional times, Michael Crowe was arrested for Stephanie's murder on January 23, 1998.

On January 26, 1998 Detective Han obtained a search warrant for the Treadway residence. Probable cause for the warrant was predicated upon the fact that Michael Crowe had been arrested for the murder, Michael had stated that Joshua Treadway was his best friend, Michael had called Joshua Treadway from the police station on the morning of the murder, and a knife meeting the description of the murder weapon had been seen at the Treadway residence.

On January 27, 1998, prior to the execution of the search warrant for the Treadway residence, Margaret Houser,[3] Aaron Houser's mother, alerted police to the fact that a knife with a 4-5 inch blade which belonged to her son was missing from his collection. Based on this information, Detective Han sought and obtained a warrant to search the Houser residence.[4] Defendants also questioned Aaron Houser

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[3] Evidence in the record, at times, refers to "Suzie" Houser. Apparently, Aaron's mother's name is Margaret Susan Houser, and she is sometimes referred to as "Suzie."

[4] A less-than-careful reader might (incorrectly) believe that Detective Claytor obtained the search warrant for the Houser residence. *See* [Houser] Plaintiffs' Memorandum of Points and Authorities in Opposition to the Escondido Defendants' MSJ or in the Alternative, Partial Summary Judgment, of the Housers' Claims p. 15:18-21. However, Detective Han, who for unknown reasons is not a defendant in this lawsuit, signed the affidavit for the search warrant and executed the warrant. Defendant

(Continued on following page)

that same day. Aaron Houser's questioning lasted approximately 1 ½ hours, and the focus of the questioning was on Michael's possible involvement in the murder. Aaron was asked about his friendship with Michael, his interest in fantasy games, and Michael's personality. Aaron told detectives that as far as he knew, Michael did not get along with his parents and that Michael had a "make-believe list of people he would kill." *See* Transcript of Interrogation of Aaron Houser dated 1-27-98 pp. 13:12-13; 15:10-21. Aaron was also asked about Aaron's interest in knives and about the knife that he was missing. Aaron did not make any self-incriminating statements during this interview.

The warrants for the Treadway and Houser residences were executed on the evening of January 27, 1998. While the warrant for the Treadway residence was being executed, Joshua Treadway was being questioned by police. Joshua's interrogation began around 7:00 p.m. During his questioning, the search of the Treadway residence revealed two knives under his bed. One had a 5 1/2 inch blade, and the other had a 6 inch blade. Joshua was then arrested for stealing Aaron Houser's knife. After being read his *Miranda* rights, Joshua admitted taking the knife from Aaron, but denied any involvement in Stephanie's death.

Claytor obtained a warrant from Judge Ramirez to search the *Crowe* home on the morning of January 21. *See* Crowe/Treadway/Houser Time Line Chart of Search and Arrest Warrants Tabs A, C, 1-3, 10 and 12.

However, over the course of further questioning, Joshua changed his story. He told defendants that he had gotten the knife from Aaron Houser and that Aaron had told him it was the knife used to kill Stephanie. Joshua's questioning ended at approximately 8:15 a.m. on January 28. Joshua was allowed to go home after the questioning.

Joshua Treadway was questioned again on February 10, 1998. This time, over the course of approximately twelve hours, Joshua gave what appeared to be a detailed account of the events leading up to the murder and stated that he had acted as a lookout while Aaron and Michael committed the murder. Joshua's confession, which was ruled voluntary by the state court trial judge, suggested that Michael killed Stephanie because he did not like her.[5] *See* Transcript of Interrogation of Joshua Treadway dated 2-10-98 p. 60:19-20 ("Well, I knew Michael hated his sister. I knew that he always had a kind of grudge against her."); p. 305:6-8 ("Well, you know, just

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[5] These statements appeared to be somewhat corroborated by a story police found on Michael's computer regarding a boy's hatred of his angel-like sister. *See* Exhibit 19 (NOL of Exhibits in Support of Defendant Summer Stephan's MSJ/Special Motion to Strike/Request for Attorney Fees and Costs). In that story, a character named Odinwrath, who starts off wearing a blood-stained cloak, comes upon a village, where he asks where he can find his sister. A peasant tells him his sister is "in the fortress of the light," and Odinwrath stabs the peasant. Odinwrath travels to the place where his sister is. His sister appears and asks, "what do you want brother?" "Your life, sister," Odinwrath replies "with an evil glare."

Michael started talking how he didn't really like his sister a whole bunch and he'd really like to kill her."); p. 358:1-2 ("Just, what I heard was Michael was always complaining about his sister.").

Joshua Treadway also told police that although he thought that Aaron and Michael were initially just joking about killing Stephanie, Aaron and Michael's plan progressed "until it became an actual thing that they had wanted to do as of the night that it happened." *Id.* pp. 309:28-310:4. At some point during the questioning, Joshua was arrested for Stephanie's murder.

On the morning of February 11, 1998, Detective Ralph Claytor, a defendant in this action, obtained search warrants for the residence and school locker of Aaron Houser. Those warrants were executed on the morning of February 11 by defendant Sweeney and Sergeant Phillip Anderson, also a defendant in this case.

Aaron Houser was arrested on February 11, 1998 and questioned for a second time. Aaron did not admit involvement in Stephanie's murder. However, during this questioning, Aaron explained that if he were going to kill Stephanie, the first thing he would do is tuck the knife in the back of his pants so that he could easily grab it when he needed it but so that she could not see it. He "would grab one of her arms and put it behind her back. And with the other one, I would grab and close her mouth and nose and pull her chin up. I would pull her back, let go of the arm,

grab the knife and cut her throat like that." Transcript of Police Interview of Aaron Houser dated 2-11-1998 p. 100:2-8. Aaron then explained that because of the chance of getting blood on himself, he would wear sparse clothing, preferably dark clothing so the blood wouldn't show up easily, "so there is not much of a chance for blood to get on it or so that it's easy to dispose of and then find a way to get out of there and clean myself off. Destroy the evidence." *Id.* pp. 100:13-17; 101:10-14. Aaron said that he would not wear gloves and that afterward he would take the knife and "fire it" to destroy chemical evidence and then he would get rid of it. *Id.* p. 100:18-28. Aaron also stated that he would choose 2:00 or 3:00 a.m. to commit the murder because it would be less likely that anyone would be awake. *Id.* p. 102:7-16. He stated that he would climb through a small window "because doors can be locked and can be noisy," as can large windows. *Id.* p. 102:17-24. Although a small window might be "a little noisy," small windows such as bathroom windows are usually locked. *Id.* p. 102:20-24. Aaron proceeded to again explain the logistics of how he would hypothetically kill Stephanie, as set forth in the following colloquy:

> Q. If you went into her room and you saw her, how would you approach it?
>
> A. Well, at this time she would probably be sleeping. She was sleeping, I probably would just try to cut her throat as quickly as possible without really waking her.
>
> Q. How would you do that?

A. If she was sleeping on her back, I would – with my left hand would cover her mouth and simultaneously slice her throat and hold it for awhile until I was sure that she was dead.

Q. And how would you know?

A. Tension in the muscles. If she was dead, they would relax. Pulse. Breathing. Eyes. If there were wide in terror. They would probably be shivering. Or they would be completely still. Again, relaxed. . . .

Id. pp. 103:25-104:12.

In late May 1998, the grand jury issued indictments against the boys. Some time after June 1, 1998, defendant Summer Stephan took over as the assigned prosecutor. Prior to the boys' trial, drops of Stephanie's blood were found on Tuite's sweatshirt. The charges against the boys were dismissed without prejudice.

After the dismissal of the charges against them, the boys and their family members filed three separate complaints in state court alleging violations of 42 U.S.C. § 1983 and various state-law torts. Defendants removed the three complaints to federal court in February 1999. On January 3, 2000, the Court issued a fifty-four page order on defendants' motions to dismiss the original complaints. In that order, the court consolidated the actions and ordered the plaintiffs to file a Joint First Amended Complaint ("JFAC").

Plaintiffs proceeded to file a JFAC consisting of 64 pages, 240 paragraphs, and 12 claims, 10 of which survived a second round of motions to dismiss. Named as defendants in the JFAC are Escondido Police Officers Claytor, Wrisley, Sweeney and Anderson (collectively "the Escondido defendants") and the City of Escondido. Also named as defendants are Lawrence Blum, a private psychologist who consulted with the Escondido Police Department during the investigation, Chris McDonough, a police officer with the City of Oceanside who participated in the interrogations of the boys, and the City of Oceanside. In addition, prosecutors Gary Hoover and Summer Stephan are also named as defendants, although plaintiffs settled with defendant Hoover prior to the entry of this order. Finally, plaintiffs named as a defendant the National Institute for Truth Verification, the manufacturer of a device, known as a "CVSA," which is marketed as a "truth verification device" and which was used during the interrogations of the boys. The court previously ruled on a motion for summary judgment brought by the National Institute for Truth Verification.

Defendants have brought a total of 10 motions for summary judgment and/or motions for partial summary judgment, which are the subject of the present order. The court has held numerous hearings and has ordered numerous supplemental briefs. The papers in this case fill 66 volumes at the clerk's office. The court has reviewed everything that has been placed before it, including approximately 40 hours of videotaped

interrogations of the boys, along with videotaped interviews of Judith Kennedy and Stephen and Cheryl Crowe. The court has viewed the actual crime scene photographs as well as a videotape of the Crowe residence taken by the police after the murder. It cannot be emphasized enough that a review of all of these materials is absolutely necessary to gain a true understanding of the actual facts in this case, for certain of the parties' papers would mislead a reader who was not thoroughly familiar with the actual evidence of record. The court notes throughout this order only some of the instances where the evidence is not as it is portrayed. It is upon the court's thorough examination of the actual evidence presented, in conjunction with its exhaustive review of the applicable law, that this decision is based.

The court notes that it has attempted to analyze each claim in detail, both with respect to the factual predicates of the claim as well as with respect to the defendants named in the claim. For example, the court has separately analyzed each of the challenged arrests and searches upon which the Treadways' and Housers' Fourth Amendment claims are predicated. Similarly, the court has analyzed each of the statements uttered by defendant Stephan which plaintiffs contend were defamatory. Moreover, it has separately analyzed the liability of the individual defendants – Blum, McDonough and Sweeney – who have filed summary judgment motions contending that they did not play a sufficient role in the alleged violations to warrant the imposition of liability. The structure of

the analysis necessarily results in a certain amount of redundancy, but it is hoped that this manner of analysis will make it clear to all which claims and which defendants remain in this action as well as the reason for the court's decision.

When reading this decision, one must keep in mind that this is a decision regarding whether defendants may be held civilly liable for the manner in which they conducted the investigation of Stephanie's murder. The court is deciding whether to grant or deny the motions for summary judgment. It is not determining who killed Stephanie Crowe, and none of the statements in this opinion should be considered a commentary regarding who may or may not be the killer.

Finally, although the court regrets that it may seem to the parties that the decision was a longtime coming, the words of a great Chicago trial judge, Judge Prentice Marshall, have never rung more true: "Please remember that all of these papers must pass through the very small eye of a very small needle – me."[6]

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[6] John G. Koeltl, *Brevity,* Vol. 30 No. 1 LITIGATION 3, 4 (Fall 2003).

ANALYSIS

I. First Claim for Relief – Violation of the Fourth Amendment

In their first claim for relief, plaintiffs allege that defendants Blum, Wrisley, Sweeney, Claytor, McDonough and Anderson violated their Fourth Amendment right to be free of unreasonable searches and seizures by arresting the boys and conducting searches without probable cause. The Fourth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, prohibits searches and arrests without probable cause. *Beck v. Ohio,* 379 U.S. 89, 90-91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964); *McKenzie v. Lamb,* 738 F.2d 1005, 1007-1008 (9th Cir.1984). "The long-prevailing standard of probable cause protects 'citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime,' while giving 'fair leeway for enforcing law in the community's protection.'" *Maryland v. Pringle,* ___ U.S. ___, ___, 124 S.Ct. 795, 798, 157 L.Ed.2d 769 (2003) (quoting *Brinegar v. United States,* 338 U.S. 160, 176, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949)). Searches and arrests without probable cause give rise to a cause of action for damages. *See McKenzie,* 738 F.2d at 1007 (arrests without probable cause give rise to a § 1983 damages action); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 395, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) (constitutional damage action for unlawful arrest under color of federal law); *Mendocino Envtl. Ctr. v. Mendocino*

County, 192 F.3d 1283 (9th Cir.1999) (§ 1983 damage action arising out of unlawful searches and seizures).

Defendants Blum, McDonough and Sweeney have each filed individual motions for summary judgment challenging the claims of all three sets of plaintiffs on the grounds that they were not sufficiently involved in the challenged searches and seizures to justify the imposition of § 1983 liability for the alleged Fourth Amendment violations. In addition, defendant Sweeney joins with defendants Wrisley, Claytor, and Anderson in seeking summary judgment with respect to the Treadways' and Housers', but not the Crowes', Fourth Amendment claims on qualified immunity grounds.

A. Defendant Blum's Motion for Summary Judgment

It is undisputed that defendant Blum, a psychologist in private practice, did not physically participate in the arrests of the boys or the searches of their residences. *See* Plaintiffs' Responses to Blum's Separate Statement of Undisputed Material Facts in Support of MSJ p. 2 ¶ 1; p. 8, ¶ 10. Rather, the Escondido defendants, who were undisputedly acting under color of state law, conducted the searches and arrests. *See King v. Massarweh,* 782 F.2d 825, 828-829 (9th Cir.1986) (plaintiffs' injuries were clearly the result of state action where state police officers conducted the arrests and searches). Where, as here, a plaintiff seeks to hold a private individual liable

under § 1983 and the alleged constitutional injury is "clearly the result of state action," the relevant inquiry is not whether the private actor acted "under color of state law" but rather whether the private actor "is sufficiently connected with the clear state action in this case to have caused these acts to occur within the meaning of section 1983." *Id.* at 828-9. In other words, "[i]n order for a private individual to be liable for a § 1983 violation when a state actor commits the challenged conduct, the plaintiff must establish that the private individual was the proximate cause of the violations." *Franklin v. Fox,* 312 F.3d 423, 445-446 (9th Cir.2002).

In order to demonstrate that a private party was the proximate cause of the plaintiff's constitutional injuries, a plaintiff must demonstrate that the private party had control over the state officials' decision to commit the act alleged to have violated the plaintiff's constitutional rights. *See Franklin,* 312 F.3d at 446 ("'[A]bsent some showing that a private party had some control over state officials' decision [to commit the challenged act], the private party did not proximately cause the injuries stemming from [the act].'") (quoting *King,* 782 F.2d at 829); *see also Arnold v. International Business Machines Corp.,* 637 F.2d 1350, 1356-6 (9th Cir.1981) (private party defendants entitled to summary judgment where plaintiff presented no evidence that defendants had "some control or power over" the state actors or that the defendants "directed" the state actors to take action against him). Here, there is absolutely no evidence

that defendant Blum had any control over the other defendants' decision to conduct the challenged searches and arrests. Accordingly, as a matter of law, defendant Blum did not proximately cause any Fourth Amendment violation and thus is entitled to summary judgment with respect to the Fourth Amendment claims of all three boys.

B. Defendant McDonough's Motion for Summary Judgment

The following facts are undisputed:

Defendant McDonough is a police officer with the City of Oceanside. Defendant McDonough was trained on the use of a "truth verification device" known as a "CVSA." On January 22, 1998, defendant McDonough responded to a call by the Escondido Police Department requesting that he conduct a CVSA examination on plaintiff Michael Crowe. Prior to January 22, 1998, defendant McDonough had never personally met defendants Claytor, Wrisley or Anderson and had only spoken with Barry Sweeney regarding past robbery cases. *See* Plaintiffs' Opposition to Defendant Chris McDonough's Separate Statement in Support of Motion for Summary Adjudication/Judgment as to All Claims Asserted by Plaintiffs Michael Crowe, Aaron Houser and Joshua Treadway p. 3, ¶ 4. This was the first time that defendant McDonough assisted another agency with the CVSA. *Id.* p. 5, ¶ 16.

Defendant McDonough questioned Michael Crowe on January 22, 1998 and utilized the CVSA device. *Id.* p. 6, ¶ 23. Afterward, defendant McDonough did not advise or recommend a course of action; specifically, he did not advise or recommend that Michael be arrested. *Id.* p. 7, ¶ 27. Defendant McDonough was not at the Escondido Police Department between January 22, 1998 and January 27, 1998. *Id.* p. 8, ¶ 31. Defendant McDonough was not present for, nor was he consulted regarding, the January 23, 1998 questioning of Michael. *Id.* p. 8, ¶ 30. Defendant McDonough did not arrest Michael and was not present when Michael was arrested on January 23, 1998. *Id.* p. 6, ¶ 22. Defendant McDonough did not participate in a search of the Crowe property, nor did he "suggest, advise or counsel any law enforcement officer to search any portion of the Crowe property." *Id.* p. 5, ¶¶ 19, 20.

On January 28, 1998, defendant McDonough received a telephone call requesting that he assist the Escondido Police Department by administering a CVSA test on plaintiff Joshua Treadway. *Id.* p. 8, ¶ 32. At that time, Joshua had already been placed under arrest by the Escondido Police Department for stealing a knife. *Id.* p. 8, ¶ 35. Defendant McDonough did not participate in the search of the Treadway residence on January 27, 1998, nor was he consulted regarding the search. *Id.* p. 10, ¶¶ 44, 45. Defendant McDonough did not "suggest, advise, or counsel any law enforcement agency to search the Treadway residence." *Id.* p. 10, ¶ 46.

Defendant McDonough was not present when plaintiff Aaron Houser was interviewed on January 27, 1998, nor was he consulted regarding the interview of Aaron on that date. *Id.* p. 11, ¶ 49, 50.

Defendant McDonough "responded to the Escondido Police Department again on February 10, 1998" to question plaintiff Joshua Treadway. *Id.* p. 11, ¶ 51. Defendant Claytor made the decision to administer the CVSA to Joshua on February 10, 1998. *Id.* p. 11, ¶ 52. Although the reason why is disputed, it is undisputed that defendant McDonough suggested that Joshua be allowed to go home after the February 10, 1998 questioning. *Id.* p. 12, ¶ 54.

The decision to arrest plaintiff Aaron Houser was made by defendants Claytor and Anderson and another officer named Bass. *Id.* p. 12, ¶ 56. On February 11, 1998, defendant McDonough "responded to the Escondido Police Department to question Aaron Houser." *Id.* p. 12 ¶ 58. The decision to administer the CVSA to Aaron was made by defendant Claytor. *Id.* p. 13, ¶ 60. Defendant McDonough did not arrest Aaron, and Aaron was already under arrest by the time defendant McDonough arrived at the Escondido Police Department on February 11, 1998. *Id.* p. 13, ¶¶ 62, 69. Defendant McDonough did not participate in a search of the residences of Margaret Houser or Gregg Houser, and defendant McDonough did not suggest, advise or counsel any law enforcement agency to search those residences. *Id.* p. 14, ¶¶ 67, 68.

Although it is undisputed that defendant McDonough did not directly participate in the challenged arrests or searches, plaintiffs seek to hold defendant McDonough liable under a conspiracy theory. Plaintiffs speculate[7] that it was Tuite who closed the door as Officer Walters sat in his patrol car outside the Crowe residence and that had Officer Walters gotten out of his car to investigate the closing door, Stephanie's murder would have been prevented. Accordingly, plaintiffs contend that

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[7] The Houser plaintiffs state that "Claytor has testified that the guy banging on all the neighbors' doors (*i.e.*, Richard Tuite) is the guy closing the Crowes' laundry room door at approximately 9:56 p.m. on January 10, 1998." Houser Plaintiffs' Memorandum of Points and Authorities in Opposition to the Escondido Defendants' MSJ or in the Alternative, Partial Summary Judgment, of the Housers' Claims p. 5:18-20. Moreover, elsewhere in their papers plaintiffs suggest that it is an undisputed fact that Tuite was the one who killed Stephanie. *See, e.g.*, Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant McDonough's MSJ of the Claims Asserted By Stephen Crowe, Cheryl Crowe, Judith Kennedy, Shannon Crowe, Margaret Susan Houser, Gregg Houser, Michael Lee Treadway and Tammy Treadway p. 3. However, as noted *supra*, Tuite is presently on trial for Stephanie's murder, and therefore it has not to date been determined who killed Stephanie. Moreover, the portions of defendant Claytor's deposition transcript cited by the Housers do not support the proposition that Claytor testified that it was Tuite who Officer Walters saw closing the door. A review of defendant Claytor's deposition reveals nothing more than that defendant Claytor agreed that *if the members of the Crowe household were telling the truth*, they could not have been the ones who Officer Walters saw closing the door that night and that he has thought about the fact that it could have been Tuite who closed the door. *See* Claytor DT pp. 84:4-8; 128:27-129:8.

defendants entered into a conspiracy to protect Officer Walters and the Escondido Police Department from criticism. Plaintiffs alternatively characterize the conspiracy as a "scheme to blame and punish the boys,"[8] a conspiracy "to coercively interrogate, arrest and incarcerate" the boys,[9] a "conspiracy to wrongfully convict and incarcerate the boys for Stephanie's murder,"[10] and a conspiracy "to coercively interrogate, arrest and incarcerate Michael Crowe along with two of his friends, Joshua Treadway and Aaron Houser. . . ."[11]

As Judge Posner explained in *Jones v. City of Chicago,* 856 F.2d 985, 992 (7th Cir.1988), in a § 1983 constitutional-tort case, "the function of conspiracy doctrine is merely to yoke particular individuals to the specific torts charged in the complaint." To be

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[8] Plaintiffs' Memorandum of Points and Authorities in Opposition to Lawrence N. Blum's MSJ, or in the Alternative, Partial Summary Judgment p. 7:3-4

[9] Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant Chris McDonough's Motion for Summary Adjudication/Judgment as to all Claims by Michael Crowe, Aaron Houser and Joshua Treadway p. 2:12-13

[10] Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant Chris McDonough's Motion for Summary Adjudication/Judgment as to all Claims by Michael Crowe, Aaron Houser and Joshua Treadway p. 13:24-25.

[11] Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant McDonough's MSJ of the Claims Asserted by Stephen Crowe, Cheryl Crowe, Judith Kennedy, Shannon Crowe, Margaret Susan Houser, Gregg Houser, Michael Lee Treadway and Tammy Treadway p. 3:16-19.

liable based upon participation in a conspiracy, "each participant in the conspiracy need not know the exact details of the plan, but each participant must at least share the common objective of the conspiracy." *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1541 (9th Cir.1989) (en banc); *see also Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir.1999). To prove a conspiracy, a plaintiff must demonstrate the existence of "'an agreement or 'meeting of the minds' to violate constitutional rights.'" *United Steelworkers*, 865 F.2d at 1540-1 (quoting *Fonda v. Gray*, 707 F.2d 435, 438 (9th Cir.1983)). The evidence of the agreement or "meeting of the minds" must be "'concrete.'" *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 782 (9th Cir.2001) (quoting *United Steel Workers*, 865 F.2d at 1540-1, 1543). Nonetheless, the evidence of such an agreement or "meeting of the minds" may be circumstantial rather than direct. *See Gilbrook*, 177 F.3d at 856-57 ("A defendant's knowledge of and participation in a conspiracy may be inferred from circumstantial evidence and from evidence of the defendant's actions."). For example, a showing that the alleged conspirators have committed acts that "are unlikely to have been undertaken without an agreement" may allow a jury to infer the existence of a conspiracy. *Kunik v. Racine County*, 946 F.2d 1574, 1580 (7th Cir.1991).

Certainly, given the extent of defendant McDonough's participation in the interrogations of the boys, a reasonable factfinder could find that there

was a "meeting of the minds" between defendant McDonough and the other defendants regarding the coercion of a confession from the boys. However, to hold defendant McDonough liable under a conspiracy theory for searches and arrests which he did not direct or execute, plaintiffs must demonstrate that he shared the common objective of the larger conspiracy alleged by plaintiffs: a conspiracy to wrongfully prosecute and convict the boys. *See* Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant Chris McDonough's Motion for Summary Adjudication/Judgment as to all Claims by Michael Crowe, Aaron Houser and Joshua Treadway p. 13:24-25. (referring to "defendants' conspiracy to wrongfully convict and incarcerate the boys for Stephanie's murder"); *United Steelworkers,* 865 F.2d at 1541 (to be liable under a conspiracy theory, "each participant in the conspiracy need not know the exact details of the plan, *but each participant must at least share the common objective of the conspiracy*") (emphasis added).

Although, as noted *supra,* "[a] defendant's knowledge of and participation in a conspiracy may be inferred from circumstantial evidence and from evidence of the defendant's actions," *Gilbrook,* 177 F.3d at 856-7, there is absolutely no concrete evidence, circumstantial or otherwise, from which an inference can be drawn that defendant McDonough was a member of such a broad conspiracy. Defendant McDonough did not work for the Escondido Police Department, did not have a prior personal or professional relationship

with any of the defendants, was requested by the Escondido Police Department because of his training with the CVSA device, and undisputedly did not participate in any of the searches or arrests or in any of the decisions to search or arrest.

Moreover, even if a factfinder were to find that defendant McDonough participated in the coercion of confessions from the boys, in light of all of the facts, the act of coercing a confession is not the type of act that is "unlikely to have been undertaken without an agreement" to violate the boys' constitutional rights on the larger scale alleged by plaintiffs. *Kunik,* 946 F.2d at 1580.

Because there is absolutely no basis for inferring that defendant McDonough, a police officer with the City of Oceanside, joined a conspiracy whose objective was, as alleged by plaintiffs, to wrongfully prosecute and convict the boys in order to protect the Escondido Police Department from criticism, defendant McDonough is entitled to summary judgment with respect to all of the Fourth Amendment claims asserted by plaintiffs.

C. Defendant Sweeney's Motion for Summary Judgment

Defendant Sweeney moves for summary judgment with respect to the boys' claims that they were arrested in violation of the Fourth Amendment on the ground that he "did not conduct any of the interrogations that led to the arrest of" the boys and he "did not arrest any of them and was not involved in the

decision to arrest them." Memorandum of Points and Authorities in Support of Defendant Barry Sweeney's MSJ or in the Alternative, Partial Summary Judgment p. 8:12-14. Similarly, he moves for summary judgment with respect to plaintiffs' claims that the searches were not supported by probable cause on the ground that he did not obtain the search warrants. *See* Memorandum of Points and Authorities in Support of Defendant Barry Sweeney's MSJ or in the Alternative, Partial Summary Judgment p. 8:20. However, Sweeney fails to address the conspiracy allegations leveled against him. Accordingly, defendant Sweeney's individual motion for summary judgment is denied with respect to plaintiffs' Fourth Amendment claims.

D. The Escondido Defendants' (Claytor, Wrisley, Anderson and Sweeney) Motion for Summary Judgment

The Escondido defendants move for summary judgment with respect to the Treadways' and Housers' Fourth Amendment claims on qualified immunity grounds. Curiously, with respect to the Houser plaintiffs' Fourth Amendment claims, the Escondido defendants nowhere argue that there was probable cause for Aaron Houser's arrest and the searches of the Houser residence and Aaron's locker, while with respect to the Treadway plaintiffs' claims, they give only lip service to the argument that there was probable cause for the searches and seizures. Because Supreme Court case law dictates that the

first step in determining whether a defendant is entitled to qualified immunity is to determine whether there has been a constitutional violation, *see Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), the court will determine whether the arrests and searches were supported by probable cause despite defendants' failure to do so. *See Doe v. Lebbos,* 348 F.3d 820, 828 (9th Cir.2003) ("We note that the parties did not brief the issue of whether Herrera's alleged actions, if proven, violated a constitutional right. We are obligated under *Saucier,* however, to address this issue at the outset of our qualified immunity analysis.").

Qualified immunity "is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). Thus, "[t]he question of immunity is not to be 'routinely place[d] . . . in the hands of the jury.'" *Lindsey v. Shalmy,* 29 F.3d 1382, 1384 (9th Cir.1994) (quoting *Hunter v. Bryant,* 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991)). That the issue of qualified immunity is not to be routinely placed in the hands of a jury was re-emphasized by the United States Supreme Court in *Saucier.* In that case, the Supreme Court disapproved of the Ninth Circuit's former practice of denying summary judgment "any time a material issue of fact remains" because such a practice "could undermine the goal of qualified immunity to 'avoid excessive disruption of

government and permit the resolution of many insubstantial claims on summary judgment.'" *Saucier,* 533 U.S. at 202, 121 S.Ct. 2151 (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)).

Thus, after *Saucier,* whether a defendant is entitled to qualified immunity is a two-step inquiry. In the first step, the court considers whether a constitutional right was violated by the officer's conduct, viewing the facts regarding the officer's conduct in the light most favorable to the plaintiff. *See Graves v. City of Coeur D'Alene,* 339 F.3d 828, 846 (9th Cir.2003); *Saucier,* 533 U.S. at 201, 121 S.Ct. 2151. The second step is to determine whether the law governing the officer's conduct "'was clearly established.'" *Graves,* 339 F.3d at 846 (quoting *Saucier,* 533 U.S. at 201, 121 S.Ct. 2151). "Whether the law was clearly established is a pure question of law for the court to decide." *Carnell v. Grimm,* 74 F.3d 977, 978 (9th Cir.1996). The clearly-established inquiry, "it is vital to note, must be undertaken in light of the specific context of the case, ***not as a broad general proposition***. . . ." *Saucier,* 533 U.S. at 201, 121 S.Ct. 2151 (emphasis added). Thus, "[t]he relevant, dispositive inquiry" is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202, 121 S.Ct. 2151. "The inquiry is not 'whether another reasonable or more reasonable interpretation of events can be construed . . . after the fact.'" *Reynolds v. County of San Diego,* 84 F.3d 1162, 1170 (9th Cir.1996),

overruled on other grounds by 114 F.3d 999 (9th Cir.1997) (quoting *Hunter,* 502 U.S. at 228, 112 S.Ct. 534). "If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Saucier,* 533 U.S. at 202, 121 S.Ct. 2151.

In the Fourth Amendment context, it is "inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present," and "in such cases those officials – like other officials who act in ways they reasonably believe to be lawful – should not be held personally liable." *Anderson v. Creighton,* 483 U.S. 635, 641, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). As the Ninth Circuit aptly noted in *Smiddy v. Varney,* 665 F.2d 261 (9th Cir.1981), "[i]t is necessary that police officers be immune when they reasonably believe that probable cause existed, even though it is subsequently concluded that it did not, because they 'cannot be expected to predict what federal judges frequently have considerable difficulty in deciding and about which they frequently differ among themselves.'" *Id.* at 266 (quoting *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 456 F.2d 1339, 1349 (2d Cir.1972) (Lumbard, J., concurring)). Thus, a police officer is entitled to qualified immunity from suit for damages arising out of a Fourth Amendment violation if a reasonable officer possessing the same facts as the defendant officer could have reasonably believed that the search or arrest was supported by probable cause even if a court later determines it was

not. *See Bilbrey v. Brown,* 738 F.2d 1462, 1467 (9th Cir.1984) ("Appellees could therefore qualify for immunity from damages if they reasonably, but mistakenly, believed that they had reasonable cause or probable cause to search appellants."); *Forster v. County of Santa Barbara,* 896 F.2d 1146, 1147-1148 (9th Cir.1990) (finding an officer is "qualifiedly immune from a suit for damages . . . unless 'a reasonably well trained officer in [his] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant'") (quoting *Malley v. Briggs,* 475 U.S. 335, 345, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)).

Importantly, a police officer's subjective intent is irrelevant to the qualified immunity analysis. *See Anderson,* 483 U.S. at 641, 107 S.Ct. 3034 ("The relevant question in this case, for example, is the objective . . . question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed. Anderson's subjective beliefs about the search are irrelevant."). Moreover, for summary judgment purposes, "[t]he fact that an expert disagrees with the officer's actions does not render the officer's actions unreasonable." *See Reynolds,* 84 F.3d at 1170; *see also Billington v. Smith,* 292 F.3d 1177, 1189 (9th Cir.2002).

1. January 26 Search of the Treadway Residence (1747 Jeffrey Avenue)

Detective Han obtained a search warrant for a search of the Treadway residence on January 26 and executed the warrant on January 27 at approximately 8:30 p.m. The following facts were included in the affidavit in support of the search warrant:

> Stephanie Crowe was stabbed to death. Her wounds were consistent with being stabbed with a knife with a 5-6 inch blade. Defendant Claytor told Detective Han that when he interviewed Michael Crowe on January 26, 1998, Michael Crowe said that Joshua Treadway was his best friend. Defendant Claytor told Detective Han that Michael Crowe called Joshua Treadway from the police department and told him that Stephanie's body had been found. Det. Lannigan told Detective Han that he had interviewed Joshua Treadway at his residence on January 22 and saw a knife at the residence in the living room on the couch. The knife had a black leather-wrapped handle with a hand guard and a 5-6 inch blade. Michael Crowe was arrested and charged with Stephanie's murder on January 23.[12]

Probable cause to search exists when, given the totality of the circumstances, it is fairly probable that contraband or evidence of a crime will be found in the

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[12] This is not a verbatim account but rather a paraphrase of what was in the warrant application.

place to be searched. *See United States v. Ocampo,* 937 F.2d 485, 490 (9th Cir.1991); *see also Alabama v. White,* 496 U.S. 325, 330, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990) ("We have held that probable cause means 'a fair probability that contraband or evidence of a crime will be found.'") (quoting *Illinois v. Gates,* 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). The evidence must simply demonstrate a "probability" of criminal activity, not a prima facie showing, and the evidence "need not be admissible, but only legally sufficient and reliable." *Franklin,* 312 F.3d at 438.

Based on the fact that Michael Crowe had been arrested for Stephanie's murder, that Joshua Treadway was Michael's best friend, and that Detective Lanigan had seen a knife fitting the description of the murder weapon at the Treadway residence immediately after the murder, there was a fair probability that evidence related to the murder would be found in the Treadway home. However, the constitutionality of a search is not conclusively established simply because the facts in the affidavit in support of the warrant support a finding of probable cause. In determining whether there is probable cause to search, it is relevant whether the affidavit in support of the warrant contained material misrepresentations, be it affirmative misrepresentations or misrepresentations by omission. The issue of the materiality of alleged misrepresentations, is, at the summary judgment stage, an issue of law for the court. *Hervey v. Estes,* 65 F.3d 784, 789 (9th Cir.1995). Affirmative

misrepresentations are material, and therefore the Fourth Amendment is violated, only if there is no probable cause absent consideration of the misrepresented facts. *See Franks v. Delaware,* 438 U.S. 154, 171-2, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). A misrepresentation based on an omission is material, and therefore the Fourth Amendment is violated, only where the omitted facts "'cast doubt on the existence of probable cause.'" *United States v. Garza,* 980 F.2d 546, 551 (9th Cir.1992) (quoting *United States v. Dennis,* 625 F.2d 782, 791 (8th Cir.1980)). However, even if a plaintiff is able to demonstrate that a warrant was issued as the result of a material misrepresentation, a police officer defendant is entitled to summary judgment on qualified immunity grounds unless the plaintiff can also demonstrate that the police officer deliberately falsified information presented to the magistrate or recklessly disregarded the truth. *See Hervey,* 65 F.3d at 789 (a defendant police officer is entitled to summary judgment on qualified immunity grounds unless "the plaintiff can *both* establish a substantial showing of a deliberate falsehood or reckless disregard and establish that, without the dishonestly included or omitted information, the magistrate would not have issued the warrant"). Thus, resolution of defendants' summary judgment motion requires consideration of the alleged misrepresentations identified by plaintiffs.

(a) The Location of Stephanie's Body

The Treadway plaintiffs contend that the judge who issued the warrant for the search of their residence was misled about Michael Crowe's involvement in the murder, which involvement was material to the issuance of the warrant for the search of the Treadway residence. In particular, the Treadway plaintiffs argue that defendants misled the judge about Michael's involvement by failing to inform the judge about the correct position of Stephanie's body upon her death. The position of Stephanie's body was relevant to the question of whether Michael had told the police the truth when he said that he had gotten up at 4:30 a.m. to take some Tylenol for a headache and had noticed that Stephanie's bedroom door was closed. Defendants maintain that Stephanie's door was not closed at 4:30 a.m., but that, in fact, Stephanie was dead in the doorway to her bedroom with the door open, and that Michael's statement to the contrary thus directed suspicion toward him. In fact, defendant Anderson testified at his deposition that part of the reason why the Escondido defendants believed that probable cause existed to arrest Michael Crowe was that he said that the door was shut at 4:30 a.m. while defendants believed that the door was open at that time and that Stephanie was lying dead in the doorway. *See* Phillip Anderson DT pp. 132:26-133:8 (Exhibit 15, Plaintiffs' NOL in Support of Plaintiffs' Opposition to Defendant City of Escondido's MSJ). Plaintiffs, however, contend that Stephanie died inside her bedroom with the door closed and that,

therefore, Michael told the truth when he said that Stephanie's door was closed when he got up at 4:30 a.m. According to plaintiffs, defendants knew that Stephanie died inside her bedroom and should have presented this fact to the judge when obtaining the warrant. Plaintiffs contend that the omission of this fact in the warrant was material.

In determining the materiality of this alleged omission, the proper focus is not on the actual position of Stephanie's body but rather on the facts that defendants had in their possession regarding the position of Stephanie's body. *See Sheik-Abdi v. McClellan,* 37 F.3d 1240, 1246 (7th Cir.1994) ("In recognition of the endless scenarios confronting police officers in their daily regimen, courts evaluate probable cause 'not on the facts as an omniscient observer would perceive them but on the facts as they would have appeared to a reasonable person *in the position of the arresting officer* – seeing what he saw, hearing what he heard.'") (quoting *Mahoney v. Kesery,* 976 F.2d 1054, 1057 (7th Cir.1992)); *see also Anderson,* 483 U.S. at 641, 107 S.Ct. 3034 (in determining whether a police officer is entitled to qualified immunity from suit for damages arising out of a search or arrest, the court must consider what facts the defendant officer possessed, and then determine whether a reasonable officer possessing the same facts as the defendant officer could have believed that the search or arrest was supported by probable cause).

On this record, it is undisputed that Stephanie died between 10:00 and 11:00 p.m. *See* Plaintiffs'

Separate Statement of Undisputed Material Facts in Opposition to Defendant City of Escondido's MSJ, Fact 17. Moreover, it is undisputed that Stephanie's bedroom door opens into a small alcove directly across from Michael's bedroom door. Although a cliche it may be, the old saying "a picture is worth a thousand words" still applies. The court has viewed the crime scene photographs, and in those photographs Stephanie is lying in the doorway of her bedroom, *i.e.*, the lower half of Stephanie's body is inside the bedroom while her head is clearly outside the bedroom, and the door is very clearly open. John Peters, one of the paramedics who first arrived on the scene, testified in his deposition that he found Stephanie in the position that she is shown in the crime scene photographs. *See* Peters DT p. 48:6-8 (Exhibit M, attached to Response of Defendant Barry Sweeney to Plaintiffs' Supplemental Reference to the Evidence in Opposition to MSJ or in the Alternative, Partial Summary Judgment). Steve Mandich, another paramedic on the scene with Peters, similarly testified at his deposition that the crime scene photographs accurately reflect his memory of where he saw Stephanie's body upon his arrival.[13] *See* Mandich DT p. 49:1-19 (Exhibit N,

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[13] Plaintiffs do not argue, nor is there any evidence suggesting, that Peters or Mandich, who are not employees of the Escondido Police Department, were involved in a conspiracy to "frame" the boys or were even aware of the event plaintiffs contend precipitated the alleged conspiracy, and there is no evidence of any other type which calls into question the credibility of Peters' or Mandich's statements regarding the location of the body. Moreover, Peters' and Mandich's deposition testimony

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attached to Response of Defendant Barry Sweeney to Plaintiffs' Supplemental Reference to the Evidence in Opposition to MSJ or in the Alternative, Partial Summary Judgment). It is further undisputed that defendant Sweeney arrived on the scene after Peters and Mandich, and therefore defendant Sweeney necessarily viewed Stephanie's body in the same position in which it was viewed by Peters and Mandich – in the doorway. Moreover, it is without doubt that it would be physically impossible for the door to be closed with Stephanie's body in the position reflected by the photographs, and no reasonable factfinder could possibly find otherwise. Thus, given the undisputed time of Stephanie's death, unless Stephanie's body was moved between the time that it was discovered by Judith Kennedy and the time Stephanie was viewed by Peters, Mandich and Sweeney *and defendants knew or haa reason to know that the body was moved,* defendants could not have known or had reason to know that Stephanie was not lying in the doorway of her bedroom when Michael got up to go to the kitchen at 4:30 a.m. Without such knowledge, defendants cannot be held liable for

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is corroborated by a report from Peters to Captain Keck dated January 21, 1998 which relates that Stephanie was found "right recumbent on floor in bedroom doorway" and that upon Peters' arrival he "found the mother holding the patient, located in the bedroom doorway on the floor." *See* Exhibit L, Response of Defendant Barry Sweeney to Plaintiffs' Supplemental Reference to the Evidence in Opposition to MSJ or in the Alternative, Partial Summary Judgment.

basing their probable cause determination on Stephanie's body being in the doorway of her bedroom. *See Sheik-Abdi*, 37 F.3d at 1247 (explaining that the test for probable cause "is an objective one – it is 'what the police know, not whether they know the truth, that matters'") (quoting *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 439 (7th Cir.1986)).

Having carefully combed the voluminous record, the court concludes that no reasonable factfinder could find that defendants knew or had reason to know that Stephanie's body was moved and therefore was not lying in the doorway at 4:30 a.m. as it was at the time the crime photos were taken. First, there is no evidence in the record suggesting that any of the members of the Crowe family moved Stephanie's body between the time it was discovered and the time that the paramedics arrived or, more importantly, that they informed defendants or anyone associated with the investigation that they had moved the body. In fact, Judith Kennedy specifically testified at her civil deposition that she did not move Stephanie's body. *See* Judith Kennedy DT p. 16:1-4 (Exhibit D, Response of Defendant Barry Sweeney to Plaintiffs' Supplemental Reference to the Evidence in Opposition to MSJ or in the Alternative, Partial Summary Judgment). Moreover, Cheryl Crowe drew a diagram of the crime scene for defendant Sweeney which a reasonable officer could interpret as showing Stephanie's body in the doorway of her bedroom with the door open. *See* Exhibit K, attached to Response of Defendant Barry Sweeney to Plaintiffs' Supplemental

Reference to the Evidence in Opposition to MSJ or in the Alternative, Partial Summary Judgment.

Based upon the above facts, a reasonable fact-finder could reach but one conclusion: when defendant Sweeney viewed the body, it was in the same position as when Peters and Mandich viewed the body, which was in the doorway of the bedroom, a position inconsistent with the door being closed. Accordingly, regardless of whether the door was actually open or closed at 4:30 a.m. when Michael Crowe went to the kitchen, on this record, a reasonable police officer could have believed that the door was open and that Stephanie was lying in the doorway, and, thus, a reasonable officer would have been justified in pursuing an investigation and obtaining warrants based on this belief. *See Sheik-Abdi,* 37 F.3d at 1247 (explaining that the test for probable cause "is an objective one – it is 'what the police know, not whether they know the truth, that matters'") (quoting *Gramenos,* 797 F.2d at 439).

Plaintiffs' arguments to the contrary notwithstanding, Judith Kennedy's statements to Wrisley during her January 21 interview cannot reasonably be interpreted as putting defendants on notice that in fact the door to the bedroom was closed when Stephanie was found. Specifically, the court notes the following colloquy, which occurred between defendant Wrisley and plaintiff Kennedy:

W: When you got up due to the alarm and you went out and you found Stephanie in the doorway I guess there –

K: Uh-huh [yes][14]

W. Did you go into her room at all?

K: No, I just stepped inside and I saw her laying there and I thought this is – something's wrong here. . . .

Having reviewed this portion of the videotape, it is clear that Kennedy did not correct defendant Wrisley when he referred to Stephanie being "in the doorway" and that Kennedy answered "no" to the question of whether she went into Stephanie's room. It is undisputed that, unlike Michael Crowe's bedroom door, Stephanie Crowe's bedroom door did not open directly into the main hallway, but opened into a small alcove that connected Stephanie's bedroom to the main hallway. Thus, it was entirely reasonable for defendant Wrisley to believe that Kennedy was referring to "stepping inside" the alcove and not Stephanie's bedroom. In addition, even assuming that Ms. Kennedy's cryptic statement to defendant Wrisley could be interpreted as a statement that the door was closed, this statement would have been immaterial to the judge's probable cause determination given all of the evidence regarding the position of Stephanie's

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[14] This utterance by Kennedy is not reflected in the transcript of the videotape but is clearly evident to a listener of the videotape.

body which suggested that the door was not closed and the absence of any evidence that the body had been moved.

Moreover, Judith Kennedy's later testimony at Michael's 707 hearing and at her deposition in this case that the door to Stephanie's bedroom was closed does not change the analysis. This testimony is inconsistent with her prior statements to police as well as with all of the physical evidence, and, in any event, this testimony came after the challenged searches and arrests and therefore this information was not in defendants' possession at the time of the challenged searches and arrests.

Finally, no reasonable factfinder could find that defendant Sweeney's admission in his deposition that Fire Department Captain Keck wrote a report stating that Stephanie's head was inside the doorway of her bedroom establishes that defendants knew or had reason to know that Stephanie's door was closed at 4:30 a.m. *See* Sweeney DT p. 575:3-9 (Exhibit 1, [Houser] Plaintiffs' NOL in Support of Plaintiffs' Opposition to Defendant City of Escondido's MSJ). First, plaintiffs fail to note that Sweeney also testified that Captain Keck admitted that this statement was inaccurate. Second, there is no evidence in the record suggesting that Captain Keck had first-hand knowledge of where Stephanie's body was found so that it would have been reasonable for defendants to take into account Keck's account of the position of the body. Third, there is no evidence that defendants had

knowledge of Keck's report at the time of the challenged searches and arrests.

In summary, the relevant issue here is not whether Stephanie's door was open at 4:30 a.m., and nothing in this opinion is to be construed as a finding regarding the position of the door at that time. Rather, the relevant issue here is whether a reasonable police officer could have believed that the door to Stephanie's bedroom was open at 4:30 a.m. and that she was lying dead in the doorway at that time, and, thus, whether a reasonable officer could have therefore believed that Michael Crowe, who stated that the door was closed, was lying and possibly involved in Stephanie's murder. On these facts, it was entirely reasonable for defendants to believe that the door to Stephanie's room was open at 4:30 a.m. and that she was lying dead in the middle of the doorway, and no reasonable factfinder could find otherwise. Accordingly, defendants cannot be held liable for failing to inform the judge that Stephanie died in her bedroom with the door closed because, regardless of where Stephanie actually died and the actual position of the door when she died, there is no basis for concluding that defendants recklessly disregarded the truth when they pursued warrants based on the assumption that Stephanie died in her doorway with the door open and that Michael Crowe was lying about seeing the door closed at 4:30 p.m. *See Hervey,* 65 F.3d at 789 (a defendant police officer is entitled to summary judgment on qualified immunity grounds where the

omission of information was not the result of a deliberate falsehood or a reckless disregard of the truth).

(b) Tuite's "Involvement" in Stephanie's Murder

The Treadway plaintiffs also contend that defendants omitted material information from the warrant application when they failed to include information regarding Tuite's "involvement" in Stephanie's murder. This argument fails because the only information regarding Tuite's *possible*[15] involvement in Stephanie's murder *which defendants possessed at the time of the challenged searched and seizures* was so speculative that this information did not negate the existence of probable cause for the challenged searches and arrests. *See United States v. Bishop,* 264 F.3d 919, 924 (9th Cir.2001) ("It is well-settled that the determination of probable cause is based upon the totality of the circumstances *known to the officers at the time of the search.*") (emphasis added); *see also Grant v. City of Long Beach,* 315 F.3d 1081, 1091 (9th Cir.2002).

When ruling on a motion for summary judgment on qualified immunity grounds, the materiality of the information in the police officer's possession is an issue for the court, and questions should be resolved in favor of the police officer. *See Lombardi v. City of*

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[15] *See* footnote 7.

El Cajon, 117 F.3d 1117, 1126 (9th Cir.1997). As the Ninth Circuit explained in *Lombardi*:

> [P]articularly where omissions are involved, materiality may not have been clear at the time the officer decided what to include in, and what to exclude from, the affidavit. In such cases, *when it is not plain* that a neutral magistrate would not have issued the warrant, the shield of qualified immunity should not be lost, because a reasonably well-trained officer would not have known that the misstatement or omission would have any effect on issuing the warrant.

Id. at 1126 (emphasis added). It is undisputed that Tuite had been seen in the area on the night of the murder and that various individuals had called the police to report Tuite because he was knocking on people's doors looking for a woman named Tracy and did not appear to have any legitimate business in the area. According to some witnesses, Tuite appeared drunk or high and agitated. *See* Sharon Thomas DT p. 16: 22-24; Sheldon Homa DT p. 17:12-15. One witness saw Tuite spinning in circles. *See* Dawn Homa DT pp. 51:11-52:2 The court will assume for purposes of this motion that at all relevant times, defendants were aware of Tuite's activities on the night of the murder. Clearly, Tuite's activities in the neighborhood would not "cast doubt" on the existence of probable cause to search the Treadway residence, and therefore would not be material, without additional evidence somehow linking Tuite to the Crowe residence.

In an attempt to show such a link, plaintiffs point to the fact that Officer Walters, who again is not a defendant in this lawsuit, saw the door to the Crowe house close between 9:30 and 9:56 p.m. on the night of the murder after responding to a neighbor's call regarding Tuite. According to plaintiffs, given Tuite's activities in the neighborhood and "the known [self-reported] whereabouts of everyone in the Crowe house at that time, the only reasonable inference is that Tuite closed the laundry room door." *See* [Houser] Plaintiffs' Points and Authorities in Support of Opposition to Escondido Defendants' MSJ p. 5, n. 4. Therefore, plaintiffs contend, reasonable officers would not have sought warrants to search plaintiffs' residences (or, had they done so, would have informed the judge about Tuite's "involvement" in Stephanie's murder) and also would not have arrested the boys.

The inference that it was Tuite who was closing the door to the Crowe residence when Officer Walters saw the door closing was not necessarily the only inference a reasonable police officer or judge could draw at the time of the challenged searches and seizures. Given Tuite's behavior as described by witnesses, Tuite would not necessarily be the most likely suspect in a murder committed between 10:00 and 11:00 p.m. inside a house inhabited by six people and a dog.[16] Moreover, as set forth *supra,* the police

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[16] As noted, it is undisputed on this record that Stephanie died between 10:00 and 11:00 p.m. Cheryl Crowe reported to police that she did not fall asleep until 11:00 p.m. *See* Interview

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had reason to believe that Michael had lied regarding not seeing Stephanie's body at 4:30 a.m. and therefore had no reason to focus their suspicion on Tuite. In addition, the police had seen a knife matching the description of the murder weapon in the Treadway residence. Finally, a reasonable officer investigating this murder was not required to believe the Crowe families' statements that none of them closed the door. In sum, at the time of the challenged searches and arrests, there was nothing more than pure speculation linking Tuite to the murder.[17] Because the facts defendants had in their possession regarding Tuite's activities on the night of the murder would not have cast doubt on the existence of probable cause, the Fourth Amendment was not violated by the failure to include this information in the warrant application. *See Garza,* 980 F.2d at 551. Moreover, this information did not negate the existence of probable cause to arrest Joshua Treadway and Aaron Houser.

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with Cheryl Lynn Crowe p. 2 (Exhibit 97, Plaintiff's Supplemental List of Evidence Supporting Opposition to Sweeney's MSJ). Therefore, Cheryl Crowe would have been up at the time of the murder, making it even more reasonable for defendants to believe that a crazy, agitated individual such as Tuite did not commit the murder.

[17] The court emphasizes that the relevant inquiry is what information the officers had regarding Tuite's involvement at the time the search warrant was obtained. *See Grant,* 315 F.3d at 1091. Thus, that information regarding Tuite's possible involvement in the murder was later uncovered is irrelevant to the present analysis. *See id.*

As an aside, plaintiffs heavily criticize defendants for not more actively pursuing Tuite as a suspect; however, "[t]he police have no affirmative obligation to investigate a crime in a particular way. . . ." *Gini v. Las Vegas Metropolitan Police Dept.*, 40 F.3d 1041, 1045 (9th Cir.1994). Moreover, the Constitution does not require that police officers thoroughly pursue all possible leads before arresting a suspect. *See Sheik-Abdi*, 37 F.3d at 1247 ("Though we have suggested that evidence of interviews and investigations may be a relevant factor in a probable cause analysis, it is not in any way a prerequisite to a finding of probable cause.") (internal citation omitted); *see also Gomez v. Atkins*, 296 F.3d 253, 262 (4th Cir.2002) ("While officers 'may not disregard readily available exculpatory evidence . . . the failure to pursue a potentially exculpatory lead is not sufficient to negate probable cause.'") (quoting *Wadkins v. Arnold*, 214 F.3d 535, 541 (4th Cir.2000)); *Brodnicki v. City of Omaha*, 75 F.3d 1261, 1264 (8th Cir.1996) (police are not required to investigate alibi of individual before using individual's statement as the basis for probable cause to arrest another; officers are "not required to conduct a minitrial" before making an arrest).

In any event, Tuite was questioned regarding the murder, and his clothes were taken from him. Although plaintiffs contend that defendants ignored blood evidence on Tuite's clothes, one should note that Joshua Treadway's own criminal defense attorney, Mary Ellen Attridge, testified in her deposition that she did not see blood evidence on the shirt when she

looked at it. *See* Mary Ellen Attridge DT p. 39: 2-12 (Exhibit 7, NOL of Exhibits in Support of Defendant Summer Stephan's MSJ/Special Motion to Strike/ Request for Attorneys Fees and Costs).

Finally, even if defendants were negligent in failing to more vigorously pursue Tuite as a suspect, negligence, even gross negligence, does not support a § 1983 claim. *See Davidson v. Cannon,* 474 U.S. 344, 347-48, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986); *Jones,* 856 F.2d at 992.

(c) The State of the Windows and Doors

The Treadway plaintiffs contend that defendants omitted material information when they failed to inform the magistrate that some of the windows and doors were unlocked. That certain windows and doors were unlocked is not inconsistent with the boys being involved in the murder and does not necessarily point to Tuite being involved in the murder. Accordingly, had this information been included in the affidavit, it would not have "cast doubt" on the existence of probable cause to believe the murder weapon would be found in the Treadway residence, and therefore this omission was not material.[18] *See Garza,* 980 F.2d at 551.

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[18] Plaintiffs criticize defendant Sweeney for failing to determine whether each door and window was secured when he inspected the exterior perimeter of the house and for failing to

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(d) Joshua Treadway's Alibi

The Treadway plaintiffs' argument to the contrary notwithstanding, it is immaterial to the probable cause analysis whether Joshua Treadway had an alibi for the time of the murder given that the issue is whether there was probable cause to search the Treadway residence for the murder weapon, which could have been given to Joshua Treadway some time after the murder.[19] Moreover, the Treadway plaintiffs admit that the defendants were not aware at the time of the January 27 search that Joshua had an alibi.[20]

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document his inspection in a report. Plaintiffs seize on Sweeney's failure to document his observations in a report because, according to the Houser plaintiffs, "[n]o one else from the Escondido police inspected the house to determine the condition of the doors and windows." p. 8: 3-5. However, this is statement is untrue, as demonstrated by the Houser plaintiffs' own exhibit. Specifically, the record contains a detailed report by Portia Nowak, who worked for the Escondido Police Department as a Community Services Officer, a non-sworn officer position. *See* Exhibit 93, Plaintiffs' Supplemental List of Evidence Supporting Opposition to Sweeney's Motion. Moreover, the existence of this report is consistent with Sweeney's explanation that he did not record the state of the windows and doors because this was a matter for the crime lab. *See* Sweeney DT p. 144:14 (Exhibit 14, [Houser] Plaintiffs' NOL in Support of Plaintiffs' Opposition to Defendant City of Escondido's MSJ).

[19] It is irrelevant whether Michael could have given the Joshua the knife due to his custodial status. What is relevant is that a reasonable police officer could have believed that someone involved in the murder gave Joshua the knife at a later time.

[20] *See* email from Robert Francavilla dated December 3, 2003 ("Josh was never asked by police during the January 27/28

(Continued on following page)

(e) The Existence of the Alleged Conspiracy to "Frame" the Boys

Finally, the Treadway plaintiffs cannot survive summary judgment by arguing their Fourth Amendment rights were violated because the state court judge was not informed of the alleged "conspiracy to frame Michael and Joshua for Stephanie's murder." Treadway Plaintiffs' Points and Authorities in Opposition to Escondido Defendants' MSJ p. 27:7-8. Assuming the existence of such a conspiracy, because the test for qualified immunity is an objective one, "the officers' subjective intent or beliefs are essentially irrelevant. . . ." *Alford v. Haner,* 333 F.3d 972, 977 (9th Cir.2003); *see also Anderson,* 483 U.S. at 641, 107 S.Ct. 3034 (officer's subjective belief about the search is irrelevant to qualified immunity analysis); *Crawford-El v. Britton,* 523 U.S. 574, 588, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998) ("A defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated. Evidence concerning the defendant's subjective intent is simply irrelevant to that defense."). Given the evidence implicating Michael Crowe and the fact that a knife fitting the description of the murder weapon was seen after the murder at the house of Michael Crowe's best friend, Joshua Treadway, the existence of such a conspiracy would, under these facts, not have cast doubt on the

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interrogation where he was on the night of the murder, and Josh never provided that information.").

existence of probable cause to search the Treadway residence and therefore would have been immaterial to the judge's determination that there was probable cause to issue the warrant.

(f) Conclusion

In conclusion, given that a knife fitting the description of the murder weapon was seen in the residence of Joshua Treadway, Michael Crowe's best friend, and given that the evidence in defendants' possession suggested that Michael lied about Stephanie's door being closed at 4:30 a.m. and therefore was involved in the murder, there was a fair probability evidence of the murder would be found in the Treadway residence. This conclusion is not altered by consideration of the additional "evidence" identified by the Treadway plaintiffs. As explained, *supra,* there was no reason for defendants to inform the judge that Stephanie's body was fully inside her bedroom at the time of her death because all of the information in defendants' possession suggested otherwise. There was no reason to inform the judge about Tuite's activities on the night of the murder because defendants did not, at the time, have in their possession sufficient information suggesting that he was involved in Stephanie's murder. There was no reason to inform the judge that some of the windows and doors were unlocked because such information was not inconsistent with the boys being involved in the murder. There was no reason to inform the magistrate judge that Joshua Treadway had an alibi on the

night of the murder because it was possible that the knife was given to him at some later time. Finally, even if a conspiracy to "frame" the boys existed, the existence of such a conspiracy would not have influenced the judge's decision to issue the warrant because whether there is probable cause to search depends upon the objective facts, not on an officer's subjective motives.

Accordingly, there was probable cause to support the search of the Treadway residence, and defendants did not violate the Treadway plaintiffs' rights.

Moreover, even if it were determined that there was not probable cause, defendants would be entitled to summary judgment under the second prong of the *Saucier* test, as a reasonable officer could have believed that it was constitutionally permissible to seek a warrant in light of the facts known to these defendants. As the Ninth Circuit explained in *Lombardi*, 117 F.3d at 1126, doubt regarding the materiality of omitted information should be resolved in favor of the police officer. Specifically, the Ninth Circuit explained that, although in *Hervey* the police officer's conduct was "outrageous" and probable cause was clearly lacking without the police officer's false statements,

> in other cases, particularly where omissions are involved, materiality may not have been clear at the time the officer decided what to include in, and what to exclude from, the affidavit. In such cases, *when it is not plain that a neutral magistrate would not have issued the warrant,* the shield of qualified

> immunity should not be lost, because a reasonably well-trained officer would not have known that the misstatement or omission would have any effect on issuing the warrant.

Lombardi, 117 F.3d at 1126 (emphasis added). Here, it is far from plain that the judge would not have issued a warrant for the search of the Treadway home had he been informed of the *actual* information in defendant's possession which was omitted from the affidavit in support of the application for the warrant, detailed *supra,* as opposed to the information alleged by plaintiffs to have been omitted.

Accordingly, the Escondido defendants are entitled to summary judgment with respect to this claim.

2. January 27 Search of the Houser Residence

On January 27, 1998, Detective Han sought and obtained a warrant to search the Houser residence after Margaret Houser, Aaron Houser's mother, alerted police to the fact that a knife with a 4-5 inch blade which belonged to her son was missing from his collection. The warrant was sought prior to the time that the knives were found under Joshua Treadway's bed. Detective Han executed the warrant. The affidavit in support of the warrant included the following information:

Defendant Claytor told Detective Han that multiple stab wounds were found on Stephanie's body and those wounds were consistent with a 5-6 inch knife blade. Through interviews, the investigation revealed that Michael Crowe and Aaron Houser are friends. On 1-22-98, detectives Lanigan and Naranjo interviewed Aaron Houser at his residence. Aaron told Detective Naranjo and Lanigan that he and Michael had been friends for over a year and had mutual interest in computer games and in medieval fantasy role play games as well as in weapons, including swords, knives, dirks and daggers. Aaron told the detectives that Michael knew that he had a medieval sword and knife collection but that he had never lent Michael any of his collection. On 1-27-98, Detective J. Lanigan received a telephone call from Margaret Houser, Aaron's mother. Margaret Houser told Detective Lanigan that Aaron had checked his medieval sword and knife collection and that one of the knives was missing. The missing knife was described as being stainless steel in color, with black plastic inserts on the handle and a 4-5 inch blade that came to a point and was sharpened. The knife was further described as having a hand stop and has indentations to facilitate a firmer grip.[21]

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[21] This is not a verbatim account but rather a paraphrase of what was in the warrant application.

Based on these facts, a reasonable officer could have believed that there was probable cause to search the Houser residence, and a state court judge so found. Thus, the issue again is whether defendants deliberately or recklessly disregarded the truth by misrepresenting or omitting information from the affidavit and whether it is plain that without the dishonestly – included information, or with the dishonestly – omitted information, the judge would not have issued the warrant. *See Garza,* 980 F.2d at 551; *Franks,* 438 U.S. at 171-2, 98 S.Ct. 2674; *Hervey,* 65 F.3d at 789. The Houser plaintiffs fail to explain how that standard is met here.

Although the Houser plaintiffs contend that defendants could not rely on Joshua Treadways' confession, there is nothing to suggest that Joshua Treadway's confession was used to establish probable cause to search the Houser residence on January 27. Moreover, as the court has already discussed, at the time this warrant was obtained, the police had information suggesting Michael's involvement in the murder, and the evidence against Tuite was not so strong as to cast doubt on Michael's involvement. Therefore, the information regarding Tuite's activities was not material to the state judge's decision to approve the warrant, and the Houser plaintiffs' Fourth Amendment rights were not violated by the omission of such information.

The Houser plaintiffs assert as a statement of fact that "Sweeney lied and orally reported that the doors and windows of the Crowe house were locked."

However, no reasonable factfinder could conclude from reading the portion of the record cited to by the Houser plaintiffs (Sweeney DT pp. 10:3-9; 28:9-20; 38:4-8; 142:17-143:4; 144:7-12 (Exhibit 14, [Houser] Plaintiffs' NOL in Support of Plaintiffs' Opposition to Defendant City of Escondido's Motion for Summary Judgment)) that defendant Sweeney lied and orally reported that the doors and the windows of the Crowe house were locked. Moreover, in any event, even if defendant Sweeney lied about the state of the windows and doors, as stated *supra,* the fact that some of the windows and doors were unlocked was not inconsistent with the boys' involvement in the murder and therefore would not have "cast doubt" on the existence of probable cause.

In conclusion, the search of the Houser residence was supported by probable cause and therefore the Houser plaintiffs' Fourth Amendment rights were not violated. Alternatively, defendants would be entitled to summary judgment under the second prong of the *Saucier* test, as it would not have been clear to a reasonable officers in possession of the same information as defendants that it was constitutionally impermissible to obtain a warrant to search the Houser residence for the murder weapon by including only the facts included by Detective Han.

Accordingly, the Escondido defendants are entitled to summary judgment with respect to this claim.

3. February 10 Arrest of Joshua Treadway

Defendant Claytor arrested Joshua Treadway for Stephanie's murder on February 10, 1998. "Probable cause for a warrantless arrest arises when the facts and circumstances within the officer's knowledge are sufficient to warrant a prudent person to believe 'that the suspect has committed, is committing, or is about to commit an offense.'" *Barry v. Fowler,* 902 F.2d 770, 773 (9th Cir.1990) (quoting *Michigan v. DeFillippo,* 443 U.S. 31, 37, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979)). In determining whether there is probable cause to arrest, it is not enough to consider only certain facts; rather, the existence of probable cause is determined by reference to all of the facts in the police officer's possession. *See Garza,* 980 F.2d at 550 ("Probable cause exists when, '*under the totality of the circumstances known to the arresting officers,* a prudent person would have concluded that there was a fair probability that [the defendant] had committed a crime.'") (quoting *United States v. Potter,* 895 F.2d 1231, 1233-34 (9th Cir.1990) (in turn quoting *United States v. Smith,* 790 F.2d 789, 792 (9th Cir.1986))) (emphasis added); *see also United States v. Buckner,* 179 F.3d 834, 837 (9th Cir.1999) (citing *Garza*). Because this was a warrantless arrest and not a search, the court does not look at whether a judge was misled. Rather, the focus is on the facts in defendants' possession and whether, in light of all of these facts, there was probable cause to arrest, or whether a

reasonable officer could have believed there was probable cause to arrest.

The declaration of probable cause to arrest, while not definitive on the issue of probable cause, provides a guide for determining the facts in the possession of the police at the time of the arrest. The declaration of probable cause to arrest Joshua Treadway sets forth the fact that Stephanie Crowe was stabbed to death in her home, that Michael Crowe had made statements implicating himself in the crime, that Joshua Treadway was Michael's best friend, that during an interview with Joshua Treadway in his home police observed a knife, that the Treadway house was searched pursuant to a warrant and a knife was found which resembled the knife reported by Aaron Houser as missing from his collection, and that Joshua Treadway subsequently admitted that the knife was the murder weapon, that he was present during plans to kill Stephanie, that he was present at the time of the homicide, and that the plan was for him to dispose of the knife, which he attempted to do.

Based on these facts, a prudent person would be warranted in believing that Treadway was co-conspirator in Stephanie's murder. *See Barry,* 902 F.2d at 773 ("Probable cause for a warrantless arrest arises when the facts and circumstances within the officer's knowledge are sufficient to warrant a prudent person to believe 'that the suspect has committed, is committing, or is about to commit an offense.'") (quoting *DeFillippo,* 443 U.S. at 37, 99 S.Ct. 2627). However, the issue is whether a reasonable officer

armed with *all* of the knowledge that defendants had at the time of the arrest could have believed that Joshua Treadway was involved in the murder of Stephanie Crowe. *See Garza,* 980 F.2d at 550; *Buckner,* 179 F.3d at 837 (citing *Garza*).

For the reasons set forth *supra,* the circumstances known to defendants regarding the state of the doors and windows and Tuite's activities on the night of the murder were not material to the probable cause determination, nor was the alleged existence of a conspiracy to "frame" the boys. Moreover, regardless of whether Michael Crowe actually made incriminating statements, given defendants' knowledge as to the location of Stephanie's body and her time of death and Michael's story that Stephanie's door was closed at 4:30 a.m., a reasonable officer would have believed there was a fair probability that Michael Crowe was involved in Stephanie's murder.

In addition, although the statements made during the latter portion of Joshua Treadway's February 10 interrogation were coerced, the court has concluded after viewing the videotape of this interrogation, and in light of the time that passed since Joshua's January 27-28 interrogation, that Joshua's statements up until page 174 of the transcript of the February 10 interrogation were voluntary and not coerced. Joshua's voluntary statements on February 10 included a statement that Aaron had given him a knife and had told him that the knife was used to kill Stephanie and that Joshua had agreed to hide the knife. Because these statements were voluntary and

not coerced, these statements could be used to establish probable cause.

Moreover, even if it were determined that these specific statements were coerced, given that at least one judge has found that none of Treadway's February 10 statements were coerced,[22] a reasonable police officer certainly could have concluded that these particular statements were not coerced, and therefore a reasonable officer could have factored these statements into a probable cause analysis.

Finally, in light of all of the evidence, the fact that Joshua Treadway's parents could provide him an alibi for the night of the murder does not negate the existence of probable cause to arrest him, as the police are not constitutionally obligated to investigate whether a defendant has an alibi prior to an arrest. *See Brodnicki,* 75 F.3d at 1264. Moreover, it was

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[22] Judge Thompson ruled that the un-*Mirandized* portion of Joshua Treadway's February 10 statements was inadmissible at trial in the government's case-in-chief because he was not advised of his *Miranda* rights prior to making the statements. However, Judge Thompson ruled that Joshua Treadway's subsequent *Mirandized* statements on February 10 were admissible because both the un-*Mirandized* and *Mirandized* February 10 statements were voluntary. Specifically, Judge Thompson concluded that "from the very beginning and throughout every viewing of [the February 10] tape, there is no doubt in my mind that Joshua Treadway was making voluntary statements on February 10. They were not coerced." *See* RT of December 17, 1998 Motion Hearing in *People v. Crowe, et al.* p. 5:23-26 (Exhibit P, Escondido Defendants' Summary Judgment Motion against Houser Plaintiffs).

reasonable to conclude that the murder weapon could have been given to him at some later time, as Joshua initially told police.

In conclusion, in light of all of the information possessed by defendants, a reasonable officer would have believed there was a fair probability that Joshua Treadway was involved in Stephanie's murder. Because there was probable cause for the arrest, defendants did not violate Joshua Treadway's rights by arresting him on February 10. Moreover, even if it were determined that there was not probable cause for Joshua Treadway's arrest, defendants would be entitled to qualified immunity under the second prong of the *Saucier* test because it would not have been clear to a reasonable officer in possession of the same facts as defendants that it was unlawful to arrest Joshua Treadway.

Accordingly, the Escondido defendants are entitled to summary judgment with respect to this claim.

4. February 11 Search of the Houser Residence and Aaron Houser's School Locker

Defendant Claytor obtained the warrant for the February 11 search of the Houser residence. The warrant was obtained telephonically. The warrant sought knives, knife cleaning equipment and metal cleaning solvents, clothing or objects bearing blood or stains from other bodily fluids, including gloves. The following facts were provided to the judge in support of the warrant application:

Stephanie was stabbed to death in her home. Michael Crowe was arrested after a determination that he was involved in the homicide. Treadway and Houser were his two best friends. During an interview with Joshua Treadway in his home, a knife was seen by the investigating officers. As a result, a warrant was obtained for a search of the Treadway home. That search revealed a knife that was identified by Aaron Houser as a knife that was missing from his knife collection. A search warrant was obtained for the Houser residence, and a search of the Houser residence revealed numerous knives.

Subsequent interviews were done with Joshua Treadway in regard to the knife. Joshua Treadway indicated that on January 25, 1998 he received the knife from Aaron Houser and was told at that time that the knife was used to kill Stephanie Crowe. Joshua Treadway was given instructions to get rid of the knife. In subsequent interviews Joshua Treadway stated that the death of Stephanie Crowe was actually a planned event that had been discussed two to three weeks prior to the homicide during classes and lunch at Orange Glen high School in the City of Escondido. On the night that the homicide occurred he was in touch with both Aaron Houser and Michael Crowe and was given instructions to go to Aaron's house and then to Michael Crowe's house at about midnight on the night of the homicide. At that location, Joshua Treadway was given instructions to wait outside and watch for

> anybody coming by. While he did so, he saw Aaron Houser enter the house, after being let in by Michael Stephen Crowe. As Aaron Houser was entering the house, he was seen taking the knife in question out of his waistband area and entering the house with it in his open hand. Joshua Treadway stated that he did not remain outside but went into the house into a kitchen area. Several minutes later he saw Aaron Houser come into the kitchen with the knife. He saw Aaron Houser rinse the knife off in the kitchen sink. As he leaves with Aaron Houser, Aaron Houser tells Joshua Treadway that Joshua is to get rid of the knife; however, Aaron is going to keep the knife to clean it up, to make sure that the job is done properly. On January 25 Aaron gave Joshua Treadway the knife, with instructions to get rid of it and clean it. Joshua Treadway stated that during the commission of this homicide, Aaron Houser was seen wearing a dark jacket and dark pants and/or shorts and black gloves, which he describes as gloves that Aaron wore to band practice at school. As a result of the interviews, Joshua Treadway was taken into custody and subsequently taken to San Diego County Juvenile Hall.[23]

Clearly, the above facts established probable cause to search. Thus, the issue once again becomes

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[23] This is not a verbatim account but rather a paraphrase of what was in the warrant application.

whether the affidavit in support of the search warrant materially misrepresented the facts known to defendants.

Although the reliability of some of the information Claytor included in the warrant is suspect due to the fact that it was obtained as the result of the coercion of Joshua Treadway, as noted, *supra,* during the first part of his February 10 interview, Joshua Treadway told the police that Aaron gave him a knife and told him that the knife was used to kill Stephanie, and this court has determined that these statements were not coerced. Considering only these uncoerced statements, a reasonable officer could have believed that Aaron was involved in Stephanie's murder and that a search of his residence and locker would yield evidence of the crime. *See Kelley v. Myler,* 149 F.3d 641, 647 (7th Cir.1998) ("[P]robable cause does not depend on the witness turning out to have been right; it's what the police know, not whether they know the truth, that matters."). Moreover, even if it were determined that these statements were coerced, given that at least one judge has found that none of Treadway's February 10 statements were coerced,[24] a reasonable police officer certainly could have concluded that Treadway's February 10 statements were not coerced and therefore could have factored these statements into a probable cause analysis.

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[24] *See* footnote 22, *supra.*

Furthermore, as discussed *supra,* the evidence that the police had with respect to Tuite and the state of the windows and doors was not material to the state judge's probable cause analysis and therefore did not need to be included in the search warrant. Furthermore, as discussed *supra,* a reasonable officer could have believed that Michael Crowe was involved in Stephanie's death. Thus, it was not materially misleading to inform the judge that Michael Crowe had been arrested for Stephanie's murder.

In addition, the Houser plaintiffs' argument to the contrary notwithstanding, no reasonable factfinder could find that defendants misrepresented that Michael and Aaron were friends. Clearly, the fact of the boys' friendship was material to the issuance of the warrant. However, no reasonable factfinder could find that defendant Claytor deliberately lied or recklessly disregarded the truth when he represented that Michael and Aaron were friends, as it is undisputed that when Ms. Houser called the Escondido Police Department to report Aaron's missing knife, she informed defendants that Aaron was a friend of Michael Crowe.[25] *See Hervey,* 65 F.3d at 789 (a

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[25] According to the Separate Statement of Uncontroverted Facts in Support of Escondido's MSJ or in the Alternative, Partial Summary Judgment of the Claims Asserted by the Houser Plaintiffs:

> "On January 27, 1998, Aaron Houser's mother, plaintiff Margaret Houser, called the Escondido Police Department and reported that her son Aaron, *who was a friend of Michael Crowe,* was missing a knife."

(Continued on following page)

defendant police officer is entitled to summary judgment on qualified immunity grounds where the omission of information was not the result of a deliberate falsehood or a reckless disregard of the truth).

Finally, the Houser plaintiffs have admitted that the police officers did not know that Aaron Houser had an alibi,[26] and the police are not constitutionally obligated to investigate whether a defendant has an alibi prior to an arrest. *See Brodnicki,* 75 F.3d at 1264. Thus, it was not unreasonable for defendants to fail to inform the judge that Aaron Houser allegedly had an alibi.

In conclusion, in light of all of the evidence known to defendants, including the evidence relied upon by the Houser plaintiffs, a reasonable officer would have believed there was a fair probability that evidence related to Stephanie Crowe's murder would be found in the Houser residence and in

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See Statement of Fact # 5 (emphasis added). In support of this statement of fact, defendants note that Detective James Lanigan testified in his deposition that Ms. Houser indicated that she thought the missing knife might be of interest to police "in light of her son being friends with Michael Crowe." *See* Exhibit C p. 57:18-21, attached to Memorandum of Points and Authorities in Support of Escondido Defendants' MSJ or in the Alternative, Partial Summary Judgment, of the Claims Asserted by the Houser Plaintiffs. *Plaintiffs do not dispute that Ms. Houser indicated to police that Michael and Aaron were friends. See* Plaintiffs' Opposition to Defendant City of Escondido's Separate Statement in Support of MSJ p. 2, # 5.

[26] *See* email from Louis Arnell dated November 25, 2003.

Aaron Houser's locker. Therefore, there was probable cause for the searches. However, even if there were no probable cause for the searches, defendants would be entitled to qualified immunity under the second prong of the *Saucier* test, because it would not have been clear to a reasonable officer possessing the same facts as defendants that it was unlawful to obtain these warrants, where there is no evidence that defendants materially misrepresented the facts to the judge who issued the warrant.

Accordingly, the Escondido defendants are entitled to summary judgment with respect to this claim.

5. February 11 Arrest of Aaron Houser

At the time of Aaron Houser's arrest, defendants had before them Joshua Treadway's uncoerced statement that Aaron had given him the knife and had told him that the knife was the knife used to kill Stephanie and that Aaron had participated in the killing with Michael. The police also had reason to believe that Michael Crowe lied about Stephanie's door being closed at 4:30 a.m. and therefore had reason to believe that Michael Crowe, a friend of Aaron's, was involved in the murder. Furthermore, police knew that Stephanie was stabbed with a knife that fit the description of Aaron Houser's knife, which was found under Joshua Treadway's bed. Based on this information, a prudent person would be warranted in believing that Aaron Houser was involved in Stephanie's murder. Moreover, for the reasons set

forth *supra,* the information defendants had in their possession regarding Tuite, the state of the windows and doors, and the alleged conspiracy would not have cast sufficient doubt on Aaron's involvement in the murder so as to negate the existence of probable cause.

Because there was probable cause to arrest Aaron, defendants did not violate the Fourth Amendment by arresting him. Alternatively, defendants would be entitled to qualified immunity under the second prong of the *Saucier* test because it would not have been clear to a reasonable officer that it was unlawful to arrest Aaron in light of the evidence in defendants' possession.

Accordingly, the Escondido defendants are entitled to summary judgment with respect to this claim.

6. The "Strip Searches" of the Boys

Defendants move for summary judgment with respect to Joshua Treadway's and Aaron Houser's claims that they were "strip searched" in violation of the Fourth Amendment after their arrests. Although the court has been provided few facts with respect to this claim, the court notes that Joshua Treadway refers in his opposition to being "semi-nude," which suggests that he was allowed to keep his underwear on. *See* The Treadway Plaintiffs' Points and Authorities in Opposition to the Escondido Defendants' MSJ or in the Alternative, Partial Summary Judgment p. 30:20-21.

To pass constitutional muster, strip searches must be supported by reasonable suspicion. *See Kirkpatrick v. City of Los Angeles,* 803 F.2d 485, 488 (9th Cir.1986). "A reasonable suspicion exists when the person responsible for the search is aware of specific articulable facts, and inferences from those facts, which reasonably warrant a suspicion that evidence will be uncovered." *Id.* at 490.

Given the brutality of the murder and the manner in which it was carried out, it certainly would have been reasonable for the police to believe that whoever committed the murder would have cuts, scratches, bruises, or other signs of a physical altercation which would be important evidence at a murder trial. In light of Joshua Treadway's statements regarding Aaron Houser's alleged role in the murder and the chilling and graphic statements made by Aaron Houser regarding how he would hypothetically murder Stephanie with a knife, which statements suggested that Aaron Houser had the inner fortitude to commit such a murder, defendants were justified in forming a suspicion that Aaron Houser was involved in the murder and therefore could have scratches, bruises, cuts, or other signs of a physical altercation. Accordingly, defendants were justified in performing a visual search of Aaron Houser in order to determine whether he showed physical signs of an altercation which would corroborate Joshua's statements and which would need to be preserved for trial by means of photographs.

The court finds that there was reasonable suspicion to conduct a partial strip search of Joshua Treadway as well.[27] Although Joshua Treadway did not confess to actually stabbing Stephanie, such a confession is not necessary to justify requiring Joshua Treadway to strip down to his underwear for a visual examination, where Joshua Treadway told police that he was present in the Crowe house at the time of the murder, a knife fitting the description of the murder weapon was found under his bed, and the murder was of the type that one could reasonably believe would leave the murderer with cuts, bruises, scratches, or other signs of a physical altercation.

Finally, the court notes that plaintiffs contend that these searches were unreasonable because they occurred almost three weeks after the murder. However, plaintiffs have failed to present any evidence suggesting that physical evidence such as defendants were looking for would not still be visible three weeks later.

Accordingly, the court concludes that defendants did not violate Joshua Treadway's and Aaron Houser's Fourth Amendment rights by conducting these searches. However, even if it were determined that there was a Fourth Amendment violation because of the amount of time that passed between the murder and the searches, defendants would be

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[27] The court notes that Joshua Treadway merely mentions this claim (in one sentence) in passing.

entitled to qualified immunity under the second prong of the *Saucier* test because it would not have been clear to a reasonable officer that a visual search of a suspect who has been arrested in a stabbing death is unlawful three weeks after the murder.

Accordingly, the Escondido defendants are entitled to summary judgment with respect to Joshua Treadway's and Aaron Houser's Fourth Amendment claims to the extent those claims are predicated upon the fact that they were strip searched.

II. Second Claim for Relief – Violation of the Fifth Amendment

In their second claim for relief, the boys allege that defendants Blum, Wrisley, Sweeney, Claytor, McDonough, and Anderson violated their Fifth Amendment privilege against compelled self-incrimination. Defendants Blum, McDonough and Sweeney have filed motions for summary judgment addressing all three boys' Fifth Amendment claims. For unknown reasons, defendants Wrisley, Claytor and Anderson challenge only Joshua Treadway's and Aaron Houser's Fifth Amendment claims.

A. Fifth Amendment Privilege Against Self-Incrimination

As a preliminary matter, as noted *supra,* "[a] defendant's knowledge of and participation in a conspiracy may be inferred from circumstantial evidence and from evidence of the defendant's actions."

Gilbrook, 177 F.3d at 856-57. On this record, given the manner in which the boys were interrogated and the length of the interrogation, a reasonable jury could find that defendants conspired to coerce confessions from the boys. Nonetheless, defendants may not be held liable simply because they conspired to violate the boys' Fifth Amendment rights. Rather, in order for the boys to have a viable claim against defendants, the boys must demonstrate that their Fifth Amendment rights were actually violated. *See Landrigan v. City of Warwick,* 628 F.2d 736, 742 (1st Cir.1980) ("[W]hile conspiracies may be actionable under section 1983, it is necessary that there have been, besides the agreement, an actual deprivation of a right secured by the Constitution and laws."); *see also Dooley v. Reiss,* 736 F.2d 1392, 1395 (9th Cir.1984).

At the time of the boys' interrogations, Ninth Circuit case law held that a Fifth Amendment violation occurs at the moment police officers coerce a confession from a suspect. However, as will be seen, after the filing of this action, there was a sea change regarding when the Fifth Amendment is actually violated, and in light of this sea change, the boys cannot demonstrate a Fifth Amendment violation.

The Fifth Amendment, which applies to the States via the Fourteenth Amendment, *Malloy v. Hogan,* 378 U.S. 1, 5, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964), provides that no person "shall be compelled *in any criminal case* to be a witness against himself. . . ." U.S. CONST. amend. V (emphasis added). The Supreme

Court has characterized the Fifth Amendment privilege against compelled self-incrimination as a privilege that "protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. United States,* 406 U.S. 441, 445, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). The Fifth Amendment's "sole concern is to afford protection against being 'forced to give testimony leading to the infliction of penalties affixed to . . . criminal acts.'" *Kastigar,* 406 U.S. at 444, 92 S.Ct. 1653 (quoting *Ullmann,* 350 U.S. at 438-9, 76 S.Ct. 497 (in turn quoting *Boyd v. United States,* 116 U.S. 616, 634, 6 S.Ct. 524, 29 L.Ed. 746 (1886))).

To this end, the Fifth Amendment operates in several distinct ways. First, absent immunity, an individual may assert the privilege against self-incrimination at any proceeding, be it civil or criminal, "wherever the answer might tend to subject to criminal responsibility him who gives it." *McCarthy v. Arndstein,* 266 U.S. 34, 40, 45 S.Ct. 16, 69 L.Ed. 158 (1924). Moreover, an individual may not be held in contempt for refusing to answer on Fifth Amendment grounds, where there is a basis for asserting the privilege, unless the individual is afforded immunity that is co-extensive with the protection afforded by the Fifth Amendment. *See Kastigar,* 406 U.S. at 462, 92 S.Ct. 1653. Finally, the Fifth Amendment operates to preclude the government's use of compelled testimony at trial in its case in chief. *See Oregon v. Elstad,*

470 U.S. 298, 306-7, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985).

While the manner in which the Fifth Amendment operates to protect an individual from self-incrimination is clear, what is not clear is when the Fifth Amendment is actually violated for purposes of allowing the imposition of liability for damages pursuant to 42 U.S.C. § 1983. Until recently, the law in the Ninth Circuit was that the Fifth Amendment is violated at the moment police coerce or compel a statement from a suspect, and therefore the Ninth Circuit recognized a § 1983 claim based on mere coercion. *See Cooper v. Dupnik,* 963 F.2d 1220, 1243 (9th Cir.1992) (en banc), *overruled by Chavez v. Martinez,* 538 U.S. 760, 123 S.Ct. 1994, 155 L.Ed.2d 984 (2003). However, a majority of the Justices in *Chavez* rejected *Cooper*'s holding and concluded that the act of coercing a statement from a suspect, in and of itself, is not an act in violation of the Fifth Amendment self-incrimination clause upon which a § 1983 claim may be predicated. Justice Thomas, joined by the Chief Justice and two other Justices, concluded that in order for the Fifth Amendment to be implicated, the suspect must be compelled, *in a criminal case,* to be a witness against himself. These four Justices concluded that there is no criminal case for Fifth Amendment purposes until, at the earliest, "legal proceedings" have been initiated. Justice Thomas explained:

> We need not decide today the precise moment when a "criminal case" commences; it

> is enough to say that police questioning does not constitute a "case" any more than a private investigator's precomplaint activities constitute a "civil case."

538 U.S. at ___, 123 S.Ct. at 2001.

Justice Souter, joined by Justice Breyer, provided a slightly different reasoning in support of his conclusion that Martinez was not entitled to damages. Justice Souter approached the issue before the Court from a policy perspective, concluding that Martinez' claim should fail on the ground that Martinez could not "make the 'powerful showing,' subject to a realistic assessment of costs and risks, necessary to expand protection of the privilege against compelled self-incrimination to the point of the civil liability he asks us to recognize here." *Id.* at ___, 123 S.Ct. at 2007. As Justice Souter explained:

> If obtaining Martinez' statement is to be treated as a stand-alone violation of the privilege subject to compensation, why should the same not be true whenever the police obtain any involuntary self-incriminating statement, or whenever the government so much as threatens a penalty in derogation of the right to immunity, or whenever the police fail to honor *Miranda*? Martinez offers no limiting principal or reason to foresee a stopping place short of liability in all such cases.

Id. at ___, 123 S.Ct. at 2007.

After *Chavez,* it is clear that a § 1983 plaintiff cannot succeed on a Fifth Amendment self-incrimination claim predicated solely upon coercive police interrogation resulting in an involuntary confession. Thus, to the extent that the boys' Fifth Amendment claim is predicated solely upon the fact that defendants interrogated them in a manner that produced involuntary confessions, their claims must fail. However, the court must explore *terra incognita* because, unlike in *Chavez,* the boys' statements here were "used" against them at a grand jury proceeding and also at a proceeding (referred to as a "707 hearing")[28] which was held in order to determine whether the boys should be tried in adult rather than juvenile court. Thus, assuming for the moment that certain of the boys' statements were the product of police coercion[29] and that liability for damages under § 1983 can, at least in some circumstances, be predicated upon a violation of the Fifth Amendment privilege against self-incrimination, this court is squarely confronted

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[28] *See* Cal. Welf. & Inst.Code 707. The court notes that the police officer defendants argue that it was actually the boys who introduced their statements at the 707 hearing. The court finds that the current record is ambiguous on this point, and therefore for purposes of this motion the court assumes that the prosecutor, not the boys, introduced the boys' statements at the 707 hearing. Moreover, the prosecutor clearly was the one who introduced the boys' statements at the grand jury proceeding.

[29] For purposes of this particular analysis of the boys' Fifth Amendment claim at the summary judgment stage, the court assumes that the boys made involuntary statements as the result of psychological coercion.

with the question of whether a "criminal case," as that term is used in the Fifth Amendment, means "criminal trial," or whether it encompasses grand jury proceedings and all proceedings that occur after an indictment is handed down.

The court begins by noting that, prior to *Chavez*, the Supreme Court had on more than one occasion characterized the privilege against self-incrimination as a *trial* right. *See Withrow v. Williams*, 507 U.S. 680, 692, 113 S.Ct. 1745, 123 L.Ed.2d 407 (9th Cir.1993) ("Nor does the Fifth Amendment 'trial right' protected by *Miranda* serve some value necessarily divorced from the correct ascertainment of guilt."). As the Supreme Court explained in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990):

> The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental *trial right* of criminal defendants. *Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial.*

(emphasis added) (internal citation omitted). Although these statements are dicta, they are cited with favor by the plurality in *Chavez*. Moreover, Supreme Court dicta is not easily ignored. *See Laub v. U.S. Dept. of Interior*, 342 F.3d 1080, 1090 (9th Cir.2003) ("Supreme Court dicta is not to be lightly disregarded."); *United States v. Baird*, 85 F.3d 450, 453 (9th Cir.1996) ("[W]e treat Supreme Court dicta with due

deference. . . ."); *Zal v. Steppe,* 968 F.2d 924, 935 (9th Cir.1992) ("[D]icta of the Supreme Court have a weight that is greater than ordinary judicial dicta as prophesy of what that Court might hold. We should not blandly shrug them off because they were not a holding.").

Furthermore, a plurality of four justices in *Chavez* suggest, through their own choice of language, that the Fifth Amendment is a trial right. *See Chavez,* 538 U.S. at ___, 123 S.Ct. at 2004 (Thomas, J.) ("Our views on the proper scope of the Fifth Amendment's Self-Incrimination Clause do not mean that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used *at trial;* it simply means that the Fourteenth Amendment's Due Process Clause, rather than the Fifth Amendment's Self-Incrimination Clause, would govern the inquiry in those cases and provide relief in appropriate circumstances.") (emphasis added).

The conclusion that "criminal case" means "criminal trial" is also supported by the Supreme Court's reasoning in *Lawn v. United States,* 355 U.S. 339, 78 S.Ct. 311, 2 L.Ed.2d 321 (1958). In *Lawn,* the defendants moved to dismiss the indictment on the ground that it was obtained using their own coerced testimony. The defendants had previously been compelled to appear before a grand jury to testify and produce records while criminal informations charging tax evasions were pending against them without being warned of their Fifth Amendment rights. The

defendants were indicted, but the indictments were dismissed. The defendants were then indicted a second time on similar charges. The defendants moved to dismiss the second indictment, contending that the evidence they were previously compelled to present was used to obtain the second indictment. The defendants also sought a hearing so that they could seek evidence in support of their contention.

The Supreme Court affirmed the denial of such a hearing. It noted that it had "several times ruled that [an] indictment returned by a legally constituted nonbiased grand jury, like an information drawn by a prosecutor, if valid on its face, is enough to call for a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment" and concluded that the defendants were not entitled to an evidentiary hearing to develop the factual basis for their assertions. *Id.* at 349-50, 78 S.Ct. 311. Importantly, the Court explained that "[i]t should be unnecessary to say that we are not here dealing with the use of incompetent or illegal evidence *in a trial on the merits,* nor with the right to decline to give incriminating testimony in legal proceedings or to suppress the direct or derivative use *at the trial* of evidence illegally obtained." *Id.* at 350, 78 S.Ct. 311 (emphasis added). Thus, the Court clearly distinguished between use of a coerced statement at trial and use of a coerced statement at a grand jury proceeding. The distinction drawn by the Court in *Lawn* further confirms that the Fifth Amendment was directed at

preventing convictions, rather than indictments, resulting from coerced statements.

In support of their argument that a criminal case commences with a grand jury proceeding, the boys contend that "criminal case" cannot mean "criminal trial" because at the time the Fifth Amendment was passed, defendants could not testify on their own behalf at trial, and therefore the framers could not have been trying to protect an accused from being called as a witness in his criminal trial. This argument is unavailing. At the time the Fifth Amendment was passed, a defendant could be an indirect witness against himself because, as the boys note, it was permissible at trial for another person to testify as to pretrial statements made by the defendant pursuant to questioning.

Finally, there are strong policy reasons for finding that the use of a compelled statement violates the Fifth Amendment privilege against self-incrimination only when the statement is used at trial. If federal courts were to recognize a Fifth Amendment violation based upon the use of coerced statements in grand jury proceedings, the result would be that defendants could insist on a "preliminary trial" to determine the validity of the indictment. The Supreme Court has consistently rejected efforts to afford defendants such a right. As the Supreme Court noted in *Costello v. United States,* 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956):

> If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment.

Id. at 363, 76 S.Ct. 406; *see also Lawn,* 355 U.S. at 350, 78 S.Ct. 311. The Court went on in *Costello* to explain that allowing defendants to challenge indictments based on the evidence presented to the grand jury

> would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change. In a trial on the merits, defendants are entitled to strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial.

Costello, 350 U.S. at 364, 76 S.Ct. 406.

Perhaps recognizing the strong policy reasons dictating against a finding that the Fifth Amendment is violated upon the use of a compelled statement in a grand jury proceeding, plaintiffs alternatively argue

that a 707 hearing, which necessarily follows rather than proceeds a grand jury proceeding, is a "trial" under California law. For the proposition that courts should look to state law in order to determine whether a proceeding is a trial for Fifth Amendment purposes, the Treadway plaintiffs cite *Hamilton v. Alabama,* 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961). In that case, the court looked to state law to determine whether an arraignment was "a critical stage in a criminal proceeding" so that the defendant was entitled to counsel at his arraignment. *Hamilton* is inapplicable here. As noted *supra,* the Fifth Amendment's "sole concern is to afford protection against being forced to give testimony *leading to the infliction of penalties* affixed to . . . criminal acts.'" *Kastigar,* 406 U.S. at 444, 92 S.Ct. 1653 (emphasis added) (internal citations omitted). A 707 hearing is a hearing to determine in which court – juvenile or adult – a defendant should be tried. Regardless of how California law might characterize a 707 hearing, it cannot be said that the use of a defendant's testimony at a 707 hearing leads to the infliction of penalties affixed to criminal acts. At most, the use of a defendant's testimony at a 707 hearing leads to a determination of the forum in which it will be determined whether penalties will be affixed to the defendant's criminal acts.

For the reasons set forth above, the court concludes that for Fifth Amendment purposes, "criminal case" means "criminal trial," *i.e.,* a proceeding at which a defendant's guilt is determined. Therefore,

the Fifth Amendment privilege against self-incrimination is not violated by the use of a defendant's compelled statements unless and until the statements are used against the defendant at trial. Here, the boys' statements were not used against them at trial. Accordingly, the boys have failed to make out a cognizable § 1983 claim for violation of their Fifth Amendment privilege against compelled self-incrimination, and defendants are entitled to summary judgment with respect to this claim.

Defendants are entitled to summary judgment with respect to this claim for an additional reason. Legal causation, or proximate cause, is an element of a § 1983 claim that must be proved. *See Baker v. McCollan,* 443 U.S. 137, 142, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979) ("[A] public official is liable under § 1983 only 'if he *causes* the plaintiff to be subjected to deprivation of his constitutional rights.'") (quoting *McCollan v. Tate,* 575 F.2d 509, 512 (5th Cir.1978)) (emphasis in original); *Arnold,* 637 F.2d at 1355 (although "not often discussed or explicitly stated in civil rights cases," causation is an element of a § 1983 claim that must be proved); Ninth Circuit Manual of Model Jury Instructions (Civil) 11.1 (to prove the violation of a federal civil right, the plaintiff must prove by a preponderance of the evidence that "the acts or omissions of the defendant were the cause of the deprivation of the plaintiff's rights protected by the Constitution or laws of the United States."). As the Ninth Circuit has explained in *Johnson v. Duffy,* 588 F.2d 740, 743 (9th Cir.1978):

> A person "subjects" another to the deprivation of a constitutional right, within the meaning of section 1983, if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made. Moreover, personal participation is not the only predicate for section 1983 liability. Anyone who "causes" any citizen to be subjected to a constitutional deprivation is also liable. The requisite causation can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.

(internal citations omitted).

Even if it could be said that the Fifth Amendment privilege against self-incrimination is violated by use of a coerced statement in a grand jury proceeding or a 707 hearing, it cannot be said that a police officer is the proximate cause of such a violation. If a statement is used at a grand jury proceeding or a 707 hearing, it is the prosecutor, not the police officer, who decides to introduce and actually introduces the statement into evidence. Moreover, at a 707 hearing, it is the trial judge who ultimately determines whether the statement will be admitted. Thus, as a matter of law, a police officer himself does not "subject" a defendant to a deprivation of the right against

self-incrimination when a coerced statement is admitted at such proceedings.

Moreover, it cannot be said that a police officer "causes" a defendant to be subjected to a violation of the privilege against self-incrimination when a coerced statement is admitted at such proceedings. As explained in *Johnson,* 588 F.2d at 743, one causes another to be subjected to a constitutional deprivation "by setting in motion a series of acts by others *which the actor knows or reasonably should know* would cause others to inflict the constitutional injury." (emphasis added). Given the roles and obligations of prosecutors and judges and the independent nature of these positions, a police officer could not reasonably know that by obtaining a coerced confession he will cause a prosecutor and/or a trial judge to violate a defendant's Fifth Amendment privilege against self-incrimination.[30] Thus, as a matter of law the police officer defendants are not the proximate cause of the Fifth Amendment violation alleged by the boys.

Practical considerations further support the court's conclusion that a police officer is not the

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[30] The court need not decide whether a police officer could be a proximate cause of a Fifth Amendment violation where the police officer and the prosecutor conspired to violate the defendant's Fifth Amendment rights, because no reasonable factfinder could find that Summer Stephan or Gary Hoover, the prosecutors in this case, conspired to violate the boys' Fifth Amendment right against compelled self-incrimination through the use of the boys' statements in a "criminal case."

proximate cause of, and therefore cannot be held civilly liable for, violation of the Fifth Amendment privilege against self-incrimination based on the use of a coerced statement in a criminal case. As noted, a majority of Justices in *Chavez* concluded that a police officer may not be held liable merely for engaging in coercive questioning. Simply put, if a police officer cannot be held liable for his own act of coercing a confession, there is no principled basis for allowing the officer to be held liable for the prosecutor's act of introducing the coerced confession in a criminal case, or for the trial court's act of erroneously allowing the coerced confession to be introduced in a criminal case.

Moreover, as defendants note, allowing the imposition of officer liability for use of a coerced statement by a prosecutor in a criminal case would have the perverse effect of assuring that only the most culpable officers escape civil liability for their actions, for only if a police officer coerces a confession using methods of interrogation that are clearly impermissible under the law will the officer be assured that the trial judge will exclude the confession at trial, thereby assuring that the suspect's statement will not be "used" in a "criminal case" within the meaning of the Fifth Amendment.

Of course, this does not mean that there is no recourse when a police officer coerces a confession. A suspect's Fifth Amendment rights are protected by the rule that a coerced confession may not be introduced in a criminal case. Moreover, as noted by the plurality in *Chavez* and as will be discussed *infra*, if

the manner in which a confession is compelled is particularly egregious, the substantive due process clause of the Fourteenth Amendment offers a remedy.

As for defendant Blum, as noted in section I.A. *supra,* defendant Blum, as a private actor, is not the proximate cause of a constitutional violation committed by a state actor unless he "had some control over" the state actors' decision to commit the unconstitutional act. *See Franklin,* 312 F.3d at 446. There is no evidence in the record suggesting that defendant Blum had such control over the police officer defendants.

Finally, Aaron Houser's Fifth Amendment claim fails for an additional reason. Having reviewed the videotape of the interrogation as well as the transcript of that interrogation, the court concludes that as a matter of law, any statements made by Aaron Houser on January 27 or February 11 were not the product of coercion. Moreover, even if Aaron Houser's statements could be deemed the product of coercion, qualified immunity would be available. In addition to this court's finding that Aaron Houser's interrogation was not conducted in a coercive manner and that statements Aaron Houser made to defendants were not the product of his will being overborne, Judge Thompson concluded that Aaron Houser's statements were not coerced. *See* RT of December 17, 1998 Motion Hearing in *People v. Crowe, et al.* p. 2:5-17 (Exhibit P, attached to Memorandum of Points and Authorities in Support of Escondido Defendants' MSJ or in the Alternative, Partial Summary Judgment, of

the Claims Asserted by the Houser Plaintiffs). If both a state court judge and a federal court judge are able to conclude that Aaron Houser's statements were not the product of coercion, a reasonable officer certainly could have believed that Aaron's interrogation was not coercive. For this additional reason, defendants are entitled to summary judgment with respect to Aaron Houser's Fifth Amendment claim.

B. *Miranda*

To the extent that the boys' § 1983 claims are predicated upon defendants' questioning of them without first providing *Miranda* warnings, such a claim is not cognizable after *Chavez*. *See Chavez*, 538 U.S. at ___, 123 S.Ct. at 2004 (Justice Thomas, joined by the Chief Justice and Justices O'Connor and Scalia) ("Chavez's failure to read *Miranda* warnings to Martinez did not violate Martinez's constitutional rights and cannot be grounds for a § 1983 action"); *Id.* at ___, 123 S.Ct. at 2013 (Justice Kennedy, joined by Justice Stevens) ("[F]ailure to give a *Miranda* warning does not, without more, establish a completed violation when the unwarned interrogation ensures."). Accordingly, defendants are entitled to summary judgment with respect to this claim.

III. Fourth Claim for Relief – Fourteenth Amendment Substantive Due Process Clause ("Shocks the Conscience")

All of the plaintiffs bring claims against defendants Blum, Wrisley, Sweeney, Claytor, McDonough and Anderson for violation of their Fourteenth Amendment substantive due process right to be free of government conduct that "shocks the conscience." Defendants Blum, McDonough and Sweeney seek summary judgment with respect to all of the plaintiffs' claims. Defendants Claytor, Wrisley and Anderson seek summary judgment only with respect to the claims brought by the Treadways and Housers.[31]

A. The Treadway and Houser Plaintiffs' Claims

Although a review of the complaint leaves one wondering about the factual basis underlying the Treadways' and Housers' claims, it appears from their oppositions to the motions for summary judgment that these claims are largely predicated upon the interrogations and "strip searches" of the boys.[32] In

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[31] Defendant Stephan was originally named in this count; however, she was dismissed from this count by the Court in its July 26, 2000 order.

[32] *See* Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant Chris McDonough's Motion for Summary Adjudication/Judgment as to all Claims by Michael Crowe, Aaron Houser and Joshua Treadway p. 25:4-7 ("In this case, given the outrageous and shocking conduct perpetrated by McDonough in his interrogations of the boys, they may proceed

(Continued on following page)

addition, Aaron Houser predicates his claim on the allegations that the Escondido police department lied to the Housers about the purpose of the investigation in order to interrogate Aaron under false pretenses and deceived Aaron by forcing Joshua Treadway to make a ruse telephone call with the intent of eliciting incriminating statements from him. Aaron also predicates his claim against defendant Blum on the allegation that defendant Blum compared him to Charles Manson and stated to the Escondido defendants that Aaron exhibited "sociopathic tendencies."

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under both the Fifth and Fourteenth Amendments."); Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant McDonough's MSJ of the Claims Asserted by Plaintiffs Stephen Crowe, Cheryl Crowe, Judith Kennedy, Shannon Crowe, Margaret Susan Houser, Gregg Houser, Michael Lee Treadway and Tammy Treadway p. 21:14-16 ("In this case, given the outrageous and shocking conduct perpetrated by McDonough in his interrogations of the boys, they, and their families, may proceed under both the Fifth and Fourteenth Amendments."); Treadway Plaintiffs' Points and Authorities in Opposition to the Escondido Defendants' MSJ or in the Alternative, Partial Summary Judgment p. 30:19-22 ("Here, the Escondido Defendants engaged in outrageous conduct as set forth above (the facts and circumstances surrounding his interrogations) and by making Joshua submit to semi-nude photographs, almost three weeks after Stephanie's body had been found."); Houser Plaintiffs' Memorandum of Points and Authorities in Opposition to the Escondido Defendants' MSJ or in the Alternative, Partial Summary Judgment, of The Housers' Claims pp. 32-33 (referring to the photographing and interrogation of Aaron as behavior in violation of the Fourteenth Amendment due process clause).

"'[I]f a constitutional claim is covered by a specific constitutional provision . . . the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.'" *County of Sacramento v. Lewis,* 523 U.S. 833, 843, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (quoting *United States v. Lanier,* 520 U.S. 259, 272 n. 7, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997)). Thus, to the extent that the boys' claims are predicated upon their "strip searches," the constitutionality of which is governed by the Fourth Amendment, such claims must fail. *See Fontana v. Haskin,* 262 F.3d 871 (9th Cir.2001) (claim that plaintiff was sexually harassed by police after arrest is more appropriately analyzed under the Fourth Amendment).

Defendants contend that plaintiffs are also precluded from predicating their § 1983 claims on the interrogations of the boys because the Fifth Amendment covers claims involving coerced confessions. While that is a fair reading of the court's previous order, that order was entered without the benefit of the Supreme Court's recent decision in *Chavez.*

In *Chavez,* the Supreme Court recognized the applicability of the Fourteenth Amendment substantive due process clause to claims based upon the manner of an interrogation. As the plurality explained, the Fourteenth Amendment substantive due process clause "would govern the inquiry" in cases involving "police torture or other abuse that results in a confession. . . ." 538 U.S. at ___, 123 S.Ct. at 2004 (Thomas, J.). Although this plurality did not find that

the Fourteenth Amendment substantive due process clause was violated under the facts of that case, five justices remanded the case to the Ninth Circuit to address the defendant's due process claim based on the manner of his interrogation.[33] In light of *Chavez, Lewis* cannot be read as precluding plaintiffs from predicating their due process claims on the manner of the boy's interrogation.

Although much time and analysis could be spent on the historical development of the Fourteenth Amendment right to substantive due process, what matters here is that "the element of arbitrary conduct shocking to the conscience [is] necessary for a [substantive] due process violation." *Lewis,* 523 U.S. at 836, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). As the Ninth Circuit explained in *Fontana v. Haskin,* 262 F.3d 871, 882 n. 7 (9th Cir.2001):

> Under the Fourteenth Amendment's due process prong, we use the "shocks the conscience" test. *County of Sacramento v. Lewis,* 523 U.S. 833[, 118 S.Ct. 1708, 140 L.Ed.2d 1043] [parallel citations omitted] (1998). *The threshold question is 'whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock*

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[33] On remand, the Ninth Circuit concluded that the defendant was not entitled to qualified immunity because the defendant's conduct was shocking to the conscience and a reasonable officer would have known that such a manner of interrogation was a violation of the due process clause.

> *the contemporary conscience.' Id.* at 848 n. 8, 118 S.Ct. 1708.

(emphasis added); *see also Chavez,* 538 U.S. at ___, 123 S.Ct. at 2005 (Thomas, J.) ("Convictions based on evidence obtained by methods that are 'so brutal and so offensive to human dignity' that they 'shoc[k] the conscience' violate the Due Process Clause.") (quoting *Rochin v. California,* 342 U.S. 165, 172, 72 S.Ct. 205, 96 L.Ed. 183 (1952)).

A review of Supreme Court case law reveals that an individual must demonstrate more than that police conduct resulted in an involuntary statement to make out a Fourteenth Amendment substantive due process claim. For example, in the classic case of *Rochin,* the Supreme Court concluded that the conduct of the police shocked the conscience, and that the use of the evidence at trial violated the defendant's Fourteenth Amendment right to due process, where the police directed a doctor to force an emetic solution through a tube into the defendant's stomach against his will to obtain evidence.[34] The Supreme Court, which throughout its opinion focused on the physical brutality of the police conduct, noted that the methods by which the evidence was obtained were "too close to the rack and the screw to permit of constitutional differentiation." *Rochin,* 342 U.S. at 172, 72

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[34] Although the Rochin court did not speak specifically in terms of "substantive" due process, it is nonetheless understood that the Rochin decision was based in substantive due process law. *See Hammer v. Gross,* 884 F.2d 1200, 1203 (9th Cir.1989).

S.Ct. 205. Similarly, the plurality in *Chavez* noted that the Fourteenth Amendment substantive due process clause remains available in cases involving "*police torture or other abuse* that results in a confession. . . ." 538 U.S. at ___, 123 S.Ct. at 2004 (Thomas, J.) (emphasis added).

In contrast, in *Moran v. Burbine,* 475 U.S. 412, 433-434, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986) the court concluded that the failure of the police to inform a suspect of efforts of an attorney, who had been retained by defendant's sister without his knowledge, to reach him while he was being interrogated fell "short of the kind of misbehavior that so shocks the sensibilities of civilized society" so as to violate the Fourteenth Amendment due process clause. Thus, it is clear that the police can engage in at least some deceptive and coercive behavior during an interrogation without running afoul of the Fourteenth Amendment.

It should be noted that cases such as *Spano v. New York,* 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959) are not to the contrary. The issue in *Spano* was whether *the admission of a coerced confession at trial* was a violation of the defendant's Fourteenth Amendment right to due process. *Spano* did not hold that the police violate the Fourteenth Amendment substantive due process clause merely by procuring a coerced confession.

Having viewed the videotaped interviews and interrogations of Joshua Treadway and Aaron Houser

in their entirety, and having also reviewed the transcripts thereof, the court concludes that defendants' behavior during the interviews and interrogations, although not commendable, was not "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Fontana,* 262 F.3d at 882 n. 7. While it cannot be forgotten that the boys were juveniles at the time of the interrogations, and while some of the interrogations were long, the manner of the interrogations was neither egregious, outrageous, nor shocking. This is not a case of physical or psychological torture. Defendants never yelled at the boys or even raised their voice. The boys were given food and water and bathroom breaks, even if not always immediately. Although the police may have lied at times, such conduct is not outrageous and, in fact, does not even necessarily amount to coercive conduct. *See Pollard v. Galaza,* 290 F.3d 1030, 1034 (9th Cir.2002) ("[W]e have explained that misrepresentations made by law enforcement in obtaining a statement, while reprehensible, does not necessarily constitute coercive conduct."); *see also United States v. Orso,* 266 F.3d 1030, 1039 (9th Cir.2001) (*en banc*). Similarly, it is not outrageous that defendants attempted to extract confessions from the boys by telling them that they could get treatment rather than jail if they confessed given that the Ninth Circuit recently found that similar statements do not even rise to the level of being coercive. *See Cunningham v. City of Wenatchee,* 345 F.3d 802, 810 (9th Cir.2003) ("Perez's suggestion that Cunningham's cooperation could lead to treatment rather than prison

is also not coercive."). Moreover, although the boys became emotional at times during the questioning, the use of questions that elicit an emotional response does not transform the interrogation into one that "shocks the conscience." *Cf. Id.* ("Perez's questions may have unsettled Cunningham, but mere emotionalism and confusion do not invalidate confessions."). Finally, although defendants employed a "good cop/bad cop" approach during some of the interviews, such a manner of interrogation is relatively common and certainly not shocking, even when juveniles are involved.

Specifically with respect to Aaron Houser, the first questioning was approximately an hour and twenty minutes long. In the videotape, Aaron Houser appears as a confident young man. No aspect of this questioning could be considered coercive, let alone shocking. Although the second questioning was approximately 9 and ½ hours long, this fact, even when considered in combination with the above facts, does not render the questioning "egregious," "outrageous," or "shocking."

With respect to Joshua Treadway, the court notes that the length of the questioning was due in large part to the fact that Joshua Treadway continued throughout the questioning to give more and more details regarding the crime, which in turn led to more and questions. The fact that defendants continued to question Joshua Treadway as he slowly gave what appeared to be more and more clues regarding the murder can hardly be deemed "shocking to the

conscience." Moreover, Joshua Treadway's demeanor at the end of the questioning also supports the conclusion that defendants did not engage in shocking behavior. For example, at the end of the questioning on January 28, Joshua Treadway stated "Not only do I feel like I'm okay, but I feel like I've accomplished . . . I feel like I've accomplished something with all this." *See* Transcript of Police Interview of Joshua Treadway dated 1-27-98 p. 289:49. He later stated "I told all that I knew. And I feel good to have that off my chest." *Id.* p. 289: 15-16. Moreover, at the very beginning of the questioning on February 10, Joshua Treadway stated that after the last questioning he felt as if he had "got[ten] rid of a heavy load" and that he felt "relieved." *See* Transcript of Interrogation of Joshua Treadway dated 2-10-98 p. 8: 8-9, 11. These are not the statements of someone who has undergone an interrogation whose manner was shocking.

Importantly, the facts surrounding the questioning of Joshua Treadway and Aaron Houser are quite distinct from the facts surrounding the interrogation in *Chavez.* As in *Rochin,* the police conduct in *Chavez* was "brutal." *See Chavez,* 538 U.S. at ___, 123 S Ct. at 2010 (Stevens, J., concurring in part and dissenting in part). "The District Court found that Martinez 'had been shot in the face, both eyes were injured; he was screaming in pain, and coming in and out of consciousness while being repeatedly questioned about details of the encounter with the police.'" *Chavez,* 123 S.Ct. at 2017 (Kennedy, J. concurring in part and dissenting in part). At least three Justices concluded

that the record supported a finding that the defendant police officer intended to exploit the plaintiff's physical pain and that the plaintiff "thought his treatment would be delayed, and thus his pain and condition worsened, by refusal to answer questions." *Id.* at ___, 123 S.Ct. at 2017. The interviews and interrogations in the present case, while not necessarily pleasant, lack such a brutal nature.

In addition, there is nothing shocking about the fact that the police enlisted Joshua Treadway to make a phone call to Aaron Houser in an attempt to elicit incriminating statements from him. Nor is defendant Blum's comparison of Aaron to Charles Manson or his statement regarding Aaron's psychological state the type of behavior that is so shocking that it violates the Fourteenth Amendment.

In summary, the manner in which Joshua Treadway and Aaron Houser were interrogated does not approach the type of brutal police conduct that has been found in other cases to be "shocking" and to therefore violate the Fourteenth Amendment substantive due process clause. Consequently, defendants did not violate Joshua Treadway's and Aaron Houser's Fourteenth Amendment rights to substantive due process. Moreover, even if it were determined that defendants' conduct did violate the boys' Fourteenth Amendment substantive due process rights, a reasonable officer would not have known that the interrogations of the boys amounted to a violation of their Fourteenth Amendment rights to substantive due process given that the interrogations lacked the

brutality that has previously marked the police conduct found by the courts to be "shocking to the conscience." Accordingly, defendants are entitled to summary judgment with respect to Joshua Treadway's and Aaron Houser's claims for violation of the Fourteenth Amendment substantive due process right to be free of government conduct that "shocks the conscience."

The parents of Joshua Treadway and Aaron Houser also bring claims for violation of the Fourteenth Amendment substantive due process clause. The Treadway and Houser parents have failed to identify any conduct on the part of defendants that would support their claims other than the conduct identified in support of the Joshua and Aaron's claims. As noted *supra,* such conduct cannot support a Fourteenth Amendment substantive due process claim. Accordingly, even if such a claim can otherwise be predicated upon conduct directed at another, because defendants' conduct toward Joshua and Aaron was does not "shock the conscience" for purposes of the Fourteenth Amendment, defendants are entitled to summary judgment with respect to the Treadway and Houser parents' claims as well.

B. The Crowe Plaintiffs' Claims

Defendants Blum, McDonough and Sweeney move for summary judgment with respect to the Crowe plaintiffs' claims.

The Crowe plaintiffs claims' against defendants Blum and McDonough appear to be predicated upon the conduct of Michael's interrogation. A review of the record reveals no concrete evidence of a conspiracy encompassing the violation of Michael Crowe's Fourth Amendment right to be free of government conduct that "shocks the conscience" of which these defendants were a part.

Moreover, neither defendant himself directly engaged in conduct that "shocks the conscience." The purpose of an interrogation is to procure a confession. Therefore, it does not "shock the conscience" that defendant Blum provided the police with advice regarding how to best procure a confession from Michael Crowe based on Michael's psychological makeup where there is no evidence that defendant Blum advised using the type of "brutal" techniques that have been held to violate the Fourteenth Amendment substantive due process clause. Moreover, assuming, as plaintiffs contend, that defendant McDonough lied to Michael during his interrogation, as discussed *supra,* it is not necessarily coercive, let alone outrageous, for a police officer to lie to a suspect during an interrogation. *See Pollard,* 290 F.3d at 1034; *Orso,* 266 F.3d at 1039. Because defendant Blum and McDonough did not engage in behavior that "shocks the conscience" so as to support a claim for violation of the Fourteenth Amendment substantive due process clause, these defendants are entitled to summary judgment.

Because defendant Sweeney has failed to address the conspiracy allegations leveled against him, his motion for summary judgment with respect to this claim is denied.

IV. Fifth Claim for Relief – Fourteenth Amendment Substantive Due Process (Deprivation of Familial Companionship)

The boys and their parents[35] allege that by arresting the boys without probable cause, which resulted in the separation of the boys from their families for a period of time, defendants Blum, Wrisley, Sweeney, Claytor, McDonough, and Anderson[36] wrongfully deprived them of their right to familial companionship in violation of the Fourteenth Amendment substantive due process clause.

A substantive due process claim for deprivation of the right to familial companionship is recognized where the deprivation is the result of "unwarranted" governmental interference. *Smith v. City of Fontana,* 818 F.2d 1411, 1418 (9th Cir.1987). As discussed *supra,* Joshua Treadway's and Aaron Houser's arrests were supported by probable cause. Thus, the state's

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[35] The court previously dismissed Shannon Crowe's and Judith Kennedy's claims for deprivation of companionship on the ground that as Stephanie's sister and grandmother, respectively, neither had the requisite relationship with Stephanie to sustain such a claim. *See* July 26, 2000 Order pp. 13:9-14:1.

[36] Defendant Stephan was dismissed from this count by the Court in its July 26, 2000 order.

interference with the familial relationships of the Treadways and Housers was not "unwarranted," and the Treadway plaintiffs' and Houser plaintiffs' claims necessarily fail. *See Schaefer v. Goch,* 153 F.3d 793, 799 (7th Cir.1998) ("Because we have concluded that Sergeant Goch did not violate Kathy Nislowski's rights under the Constitution, her parents' claims based on the loss of her society and companionship necessarily fail as well.").

Moreover, even if Joshua Treadway's and Aaron Houser's arrests had not been supported by probable cause, a reasonable officer could have believed that they were supported by probable cause. Therefore, defendants would be entitled to qualified immunity under the second prong of the *Saucier* test because a reasonable officer would not have known that these arrests constituted an "unwarranted" interference with the right of companionship which would support a substantive due process claim.

Accordingly, all of the defendants are entitled to summary judgment with respect to the Treadways' and Housers' Fourteenth Amendment claims for deprivation of companionship.

With respect to the Crowes' claims for deprivation of companionship, the Escondido defendants do not argue that there was probable cause to arrest Michael Crowe or that the Crowes did not suffer a deprivation of the constitutional right to familial companionship; rather, they argue that this right was not clearly established and therefore a reasonable

officer at the time of Michael Crowe's arrest would not have known that it would violate this right to arrest Michael without probable cause.

As noted *supra,* "[w]hether the law was clearly established is a pure question of law for the court to decide." *Carnell,* 74 F.3d at 978. The clearly-established inquiry "must be undertaken in light of the specific context of the case, *not as a broad general proposition. . . .*" *Saucier,* 533 U.S. at 201, 121 S.Ct. 2151 (emphasis added). Thus, "[t]he relevant, dispositive inquiry" is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202, 121 S.Ct. 2151; *see also Cruz v. Kauai County,* 279 F.3d 1064, 1069 (9th Cir.2002) ("The right must be established at more than an abstract level: it 'must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'") (quoting *Anderson,* 483 U.S. at 640, 107 S.Ct. 3034). "If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Saucier,* 533 U.S. at 202, 121 S.Ct. 2151. There is a common sense element to this test. *Jensen v. City of Oxnard,* 145 F.3d 1078, 1086 (9th Cir.1998) ("It is clearly established both by common sense and by precedent").

Clearly, at the time of Michael Crowe's arrest, both the Ninth Circuit and the Supreme Court had

recognized that parents and children have a constitutional right in maintaining a familial relationship. *See Kelson v. City of Springfield,* 767 F.2d 651, 654 (9th Cir.1985) ("The Supreme Court has repeatedly reaffirmed the existence of a constitutional right to the maintenance of a parent-child relationship."); *Smith,* 818 F.2d at 1418 (children have a constitutionally protected liberty interest in their relationships with their parents), *overruled on other grounds by Hodgers-Durgin v. de la Vina,* 199 F.3d 1037 (9th Cir.1999). However, the relevant issue is whether it was clearly established at the time of Michael Crowe's arrest that this constitutional right is violated when the police arrest a child without probable cause. *See Saucier,* 533 U.S. at 202, 121 S.Ct. 2151 ("If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate.").

Although defendants may be correct that this issue has not been addressed by the Supreme Court, Ninth Circuit law can "clearly establish" the law for qualified immunity purposes. *See Kirkpatrick v. City of Los Angeles,* 803 F.2d 485, 490 (9th Cir.1986) ("In the absence of binding precedent from this court *or* the Supreme Court, we look to decisions from other courts to determine if the right was clearly established.") (emphasis added). At the time of the arrest of Michael Crowe, the law of this Circuit was that children and parents have an interest in companionship that constitutes a cognizable liberty interest and that the "unwarranted" interference with this liberty

interest due to the "affirmative abuse of government power" rises to the level of a substantive due process violation. *See id.* at 1418. Although in *Smith* the "affirmative abuse of government power" was the use of excessive force during an arrest, the arrest of an individual without probable cause certainly arises to the level of an "affirmative abuse of government power," and a reasonable officer would have known as much.

Although defendants argue that it was not clearly established that the right to companionship is violated by a wrongful arrest because cases at the time of Michael Crowe's arrest involving police officers only involved the permanent, rather than temporary, deprivation of this right, defendants have failed to demonstrate that this distinction is sufficiently significant that a reasonable police officer could have believed that a temporary deprivation does not violate this right. Although the wrongful conduct in *Smith* resulted in death, defendants have failed to identify any language in *Smith* which suggests that the Ninth Circuit's recognition of the validity of the plaintiff's claim was predicated upon the fact that the wrongful use of government power resulted in a permanent deprivation of the right to companionship, and this court can find none.

Moreover, although *Ovando v. City of Los Angeles*, 92 F.Supp.2d 1011 (C.D.Cal.2000) was decided after the relevant events in the present case and is not evidence of the state of the law at the time of Michael Crowe's arrest, the district court's reasoning

in *Ovando* is consistent with this court's conclusion that it was not reasonable at the time of Michael Crowe's arrest for a police officer to believe that it was constitutionally permissible to temporarily interfere with the right of familial companionship by means of an unlawful arrest.

In *Ovando,* a daughter brought a civil rights action after her father was released from prison after being identified as one of the victims of the now-notorious Los Angeles Police Department ("LAPD") "Rampart" scandal, which involved "a wide variety of misconduct by LAPD officers including the shooting of unarmed suspects, the planting of evidence to justify those shootings, the preparation of false police reports to cover up the misconduct and the presentation of perjured testimony resulting in the false convictions and imprisonment of a number of innocent citizens." 92 F.Supp.2d at 1014. The daughter claimed that her constitutional right to familial association was violated by both the wrongful imprisonment of her father for almost three years and by the fact that he was rendered a paraplegic and suffered severe, permanent brain damage arising out the use of force by police.

The district court, recognizing that "a child has a substantive due process right in her relationship with her parents which may be vindicated through a Section 1983 action," considered the scope of that right. *Id.* at 1018. The defendants argued that the daughter had failed to state a claim for deprivation of companionship because the deprivation was not

"permanent." The district court rejected this argument, explaining that it "finds no support in the case law." *Id.* at 1019. As the district court explained:

> There is nothing in *Smith* that suggests that the holding is limited to wrongful death cases. Rather, the Court held simply that the liberty interest protected by the Fourteenth Amendment is the right to be free from State interference with the companionship and society of one's parent. *Smith,* 818 F.2d at 1419. Nowhere in its opinion did the Court indicate that a deprivation of a duration shorter than the entirety of the child's life was not a "deprivation" cognizable under Section 1983, and this Court can find no principled basis for drawing such a distinction. Here, the unlawful imprisonment of Destiny's father constituted a complete deprivation of his companionship and society for the term of his imprisonment. While Destiny's father's absence may have been "temporary" in the sense that it did not last for the entirety of her life, Destiny's relationship with her father was permanently severed during that interval – those three years can never be retrieved. In that sense it was a temporary, but total, deprivation of a right recognized under the Fourteenth Amendment. *See Sniadach v. Family Finance Corp.,* 395 U.S. 337, 340, 89 S.Ct. 1820, 1822, 23 L.Ed.2d 349 (1969) (prejudgment garnishment of wages without notice and prior hearing violated due process where deprivation of property is temporary but total).

Id. at 1019 (internal footnote omitted).

In determining that the right asserted by the Crowes was clearly established, the court also finds significant the case of *Morrison v. Jones,* 607 F.2d 1269 (9th Cir.1979). In that case, a mother, a German alien residing in the United States, brought an action after her minor son, also a German alien, was taken from Riverside General Hospital and transported by the county to Germany to reside with his grandparents, with whom he had resided before coming to the United States to be with his mother. Within several months of being notified that her son had been returned to Germany, the mother filed an action in federal court against, *inter alia,* the Director of Public Social Services, who requested that the County Board of Supervisors for Riverside County approve funds to transport the boy to Germany; the members of the County Board of Supervisors for Riverside County, who approved the funds; the Department of Public Social Services for the County of Riverside; and the Director of Child Psychiatry of the In-Patient Unit, Riverside General Hospital, who allegedly recommended to the Board that the boy be sent to Germany because he was taking up valuable bed space.

The defendants argued, *inter alia,* that the mother did not have standing to sue because she was merely asserting the rights of her son. The Ninth Circuit rejected this argument explaining that the mother

> is asserting her interest as the mother of the child to preserve her access to the child and her access to effective judicial relief, which,

> she alleges, the defendants' conduct destroyed. The defendants' alleged actions unquestionably caused injury to Morrison with respect to her relationships with her son. Those interests, based on familial concepts, recognized by custom and practice for generations, are protected under the Constitution.

Id. at 1275 (citations omitted). Defendants, recognizing that *Morrison* is a case dealing with a "less than permanent" deprivation of the right to companionship, contends that it is distinguishable because it dealt with such a deprivation "in the context of the *procedural* due process ramifications of *direct* interference with family relationship." Memorandum of Points and Authorities in Support of Defendant Barry Sweeney's MSJ or in the Alternative, Partial Summary Judgment p. 15:3-5 (emphasis added). Defendants' attempt to distinguish *Morrison* is unavailing for two reasons.

First, the Ninth Circuit in *Morrison* held that the plaintiff stated a claim for relief "based upon her constitutionally secured rights to procedural due process of law *and her substantive familial rights* that have long been considered the 'basic civil rights of man.'" 607 F.2d at 1276 (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942)) (emphasis added). Therefore, Morrison did not, as defendants suggest, involve only a procedural due process claim.

Second, it is irrelevant that *Morrison* involved "direct interference with the family unit, with an

intent to disrupt the family unit in order to protect the children" rather than a deprivation "as an incidental by-product of police action"[37] given that the *Smith* case recognized a substantive due process claim where the deprivation of companionship was the "incidental by-product" of the use of excessive force by the police.

Finally, defendants rely on case law from other circuits in an attempt to demonstrate that the law in this area was not clearly established; however, where the law is clearly established in the Ninth Circuit, the court need not look to other circuits. *See Kirkpatrick*, 803 F.2d at 490 ("*In the absence of binding precedent from this court or the Supreme Court,* we look to decisions from other courts to determine if the right was clearly established.") (emphasis added).

Having determined that defendants are not entitled to qualified immunity with respect to the Crowe's claims for violation of the right to companionship, the court turns to additional arguments brought by specific defendants.

Defendants Blum, McDonough and Sweeney each contend that they are entitled to summary judgment with respect to all of the plaintiffs' claims for deprivation of companionship because they were not involved in the arrests of the boys.

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[37] Memorandum of Points and Authorities in Support of Defendant Barry Sweeney's MSJ or in the Alternative, Partial Summary Judgment p. 15:9-13.

As noted in section I.A. *supra*, it is undisputed that defendant Blum did not himself participate in the arrests of the boys or the searches of their residences, and there is no evidence from which a reasonable factfinder could find that defendant Blum had any control over the other defendants' decision to conduct the arrests that underlie this claim. Accordingly, as a matter of law, defendant Blum was not the proximate cause of any deprivation of companionship that plaintiffs may have suffered and therefore cannot be held liable with respect to this claim. *See Franklin,* 312 F.3d at 445-446; *King,* 782 F.2d at 829.

As noted in section I.B. *supra*, it is undisputed that defendant McDonough did not arrest the boys and was not involved in the decision to arrest the boys. Moreover, although a reasonable factfinder could find that defendant McDonough was involved in a conspiracy regarding the interrogation of the boys, there is no evidence from which a reasonable factfinder could find that defendant McDonough was a part of a larger conspiracy involving the arrest and prosecution of the boys. Because, as set for in section I.B., *supra,* defendant McDonough cannot be held liable for the boys' arrests, he cannot be held liable for the deprivation of companionship arising out of the boys' arrests.

On the other hand, as noted in section I.C., *supra,* defendant Sweeney has failed to adequately demonstrate that he cannot be held liable for the boys' arrests. Accordingly, although he is entitled to summary judgment with respect to the Treadways'

and Housers' claims for violation of the right to companionship because Joshua Treadway's and Aaron Houser's arrests were supported by probable cause, defendant Sweeney has failed to demonstrate that he is entitled to summary judgment with respect to the Crowes' claims on the basis that he was not "involved" in Michael Crowe's arrest.

V. Sixth and Tenth Claims for Relief – § 1983 defamation plus and state law defamation

The boys bring a state law claim for defamation as well as a § 1983 claim predicated upon defamation against defendants Stephan, Blum and Sweeney.

A. Defendant Stephan

Defendant Stephan took over as the prosecutor assigned to prosecute the boys in June 1998. Defendant Stephan handled the 707 hearings, the pretrial motions (including the suppression motions) and prepared for trial against Joshua Treadway. On the eve of Joshua's trial, traces of Stephanie's blood were found on Tuite's red sweatshirt. The District Attorney's Office subsequently moved to dismiss the charges against the boys. The superior court dismissed the charges on February 25, 1999.

After the charges against the boys were dismissed, then-District Attorney Paul Pfingst requested that defendant Stephan appear on the "48 Hours" news program. Defendant Stephan sought the advice

of the in-house ethics advisor, Brian Michaels, who told her that she could ethically appear on the show as long as she referenced the public record. *See* Stephan Decl. ¶ 5; Brian Michaels Decl. ¶ 5; Stephan DT pp. 32:16-33:18; 34:7-35:5; 35:10-23 (Exhibit 9, NOL of Exhibits in Support of Defendant Summer Stephan's MSJ/Special Motion to Strike/Request for Attorney Fees and Costs).

Defendant Stephan and the District Attorney's media advisor, Gayle Falkenthal, met with a "48 Hours" reporter. Defendant Stephan answered questions during a two-hour, twenty-minute interview that was videotaped. Two minutes and nine seconds of this interview was used in the "48 Hours" program. The statements defendant Stephan made during this interview are the statements upon which the boys' defamation claims are predicated.

1. State Law Defamation

California Civil Code § 44 defines "defamation" as either libel or slander. California Civil Code § 46 provides:

> Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which:
>
> 1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;

> 2. Imputes in him the present existence of an infectious, contagious, or loathsome disease;
>
> 3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;
>
> 4. Imputes to him impotence or a want of chastity; or
>
> 5. Which, by natural consequence, causes actual damage.

If a statement falls within § 46(1)-(4), it is considered defamatory per se. *See Rodriguez v. Panayiotou,* 314 F.3d 979, 983 (9th Cir.2002).

The assertions of defendants Sweeney and Blum to the contrary notwithstanding, whether a statement is defamatory does not depend on whether it can be characterized as an opinion. Although support for such a position can be found in *Tschirky v. Superior Court,* 124 Cal.App.3d 534, 539, 177 Cal.Rptr. 357 (1981), later California cases have eschewed this position in light of the Supreme Court case of *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990). As the California court of appeal stated in *Kahn v. Bower,* 232 Cal.App.3d 1599, 284 Cal.Rptr. 244 (1991), "the dispositive question after *Milkovich* is 'whether a reasonable fact finder could

conclude that the published statements imply a provably false factual assertion.'" *Id.* at 1607, 284 Cal.Rptr. 244 (quoting *Moyer v. Amador Valley J. Union High School Dist.*, 225 Cal.App.3d 720, 724, 275 Cal.Rptr. 494 (1990)); *see also Gilbrook*, 177 F.3d at 861-2 ("[A] court reviewing a claim of defamation must ask a threshold question: Could a reasonable factfinder conclude that the contested statement implies an assertion of objective fact?").

"The question whether challenged statements convey the requisite factual imputation is ordinarily a question of law for the court." *Kahn*, 232 Cal.App.3d at 1608, 284 Cal.Rptr. 244 (1991). It is also for the court to determine whether a statement is reasonably susceptible of a defamatory interpretation. *See id.* If the court determines that the statement is reasonably susceptible of a defamatory interpretation, "it is for the jury to determine whether a defamatory meaning was in fact conveyed to the listener or reader." *Id.*

The boys contend that defendant Stephan's statements are defamatory per se pursuant to § 46(1) because they charge the boys with killing Stephanie. As noted *supra*, "a court reviewing a claim of defamation must ask a threshold question: Could a reasonable factfinder conclude that the contested statement implies an assertion of objective fact?" *Gilbrook*, 177 F.3d at 861-2. Only if a contested statement implies a false assertion of objective fact does it fall outside of the protection of the First Amendment. *See Partington v. Bugliosi*, 56 F.3d 1147, 1153 (9th Cir.1995). As the Ninth Circuit has explained:

> To make that determination, this court has adopted a three-part test, in which *we must examine the totality of the circumstances in which the defendant made the challenged statement.* First, we look at the statement in its broad context, which includes the general tenor of the entire work, the subject of the statements, the setting, and the format of the work. Next we turn to the specific context and content of the statements, analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in that particular situation. Finally, we inquire whether the statement itself is sufficiently factual to be susceptible of being proved true or false.

Gilbrook, 177 F.3d at 862 (emphasis added). Similarly, in determining whether a statement is "sufficiently communicative of provable falsity or actual fact to subject the defendant to liability," California courts consider the "totality of the circumstances," including the language of the statement and the context in which the statement was made. *See Kahn,* 232 Cal.App.3d at 1608, 284 Cal.Rptr. 244. "'This contextual analysis demands that the courts look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed.'" *Id.* at 1608, 284 Cal.Rptr. 244 (quoting *Moyer,* 225 Cal.App.3d at 724, 275 Cal.Rptr. 494 (in turn quoting *Baker v. Los Angeles Herald Examiner,* 42 Cal.3d at 260-1, 228 Cal.Rptr. 206, 721 P.2d 87)).

Because the statements upon which the boys' defamation claims are predicated are statements in "sound bites" which were taken from an extensive interview, it is important to note that "defamatory meaning must be found, if at all, in a reading of the publication as a whole. . . . Defamation actions cannot be based on snippets taken out of context." *Kaelin v. Globe Communications Corp.,* 162 F.3d 1036, 1040 (9th Cir.1998); *see also Selleck v. Globe International Inc.,* 166 Cal.App.3d 1123, 1131, 212 Cal.Rptr. 838 (1985) (court must examine newspaper's headlines, caption, and article as a whole); *Corman v. Blanchard,* 211 Cal.App.2d 126, 131-2, 27 Cal.Rptr. 327 (1962) (examination of entire allegedly defamatory pamphlet necessary "to understand its import and the effect which it was intended to have on the reader"). Importantly, an individual who gives an interview "is not responsible for the subsequent editing" of the interview but rather is responsible only for statements made "in their full and complete form, not the sound bites they became." *Metabolife Int'l, Inc. v. Wornick,* 264 F.3d 832, 847 (9th Cir.2001).

Finally, not only must the statement imply an assertion of objective fact, but the assertion must be false, because in a defamation action, "the truth of the offensive statements or communication is a complete defense against civil liability. . . ." *Ringler Associates Inc. v. Maryland Cas. Co.,* 80 Cal.App.4th 1165, 1180, 96 Cal.Rptr.2d 136 (2000) (quoting *Smith v. Maldonado,* 72 Cal.App.4th 637, 646, 85 Cal.Rptr.2d 397 (1999)); *see also Monterey Plaza Hotel v. Hotel*

Employees & Restaurant Employees, 69 Cal.App.4th 1057, 1064, 82 Cal.Rptr.2d 10 (1999) ("'The *sine qua non* of recovery for defamation . . . is the existence of falsehood.'") (quoting *Old Dominion Branch No. 496, Nat. Ass'n of Letter Carriers v. Austin,* 418 U.S. 264, 283, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974)). "Significantly, . . . the defendant need not justify the literal truth of *every word* of the allegedly defamatory matter. It is sufficient if the *substance* of the charge is proven true, irrespective of slight inaccuracy in the details, 'so long as the imputation is substantially true so as to justify the 'gist or sting' of the remark.'" *Ringler Associates Inc.,* 80 Cal.App.4th at 1180-81, 96 Cal.Rptr.2d 136 (quoting *Campanelli v. Regents of University of California,* 44 Cal.App.4th 572, 581-582, 51 Cal.Rptr.2d 891 (1996)).

With this legal framework in mind, the court turns to the statements identified in plaintiffs' opposition as the statements upon which plaintiffs' claims are predicated.

(a) "Her brother [Michael] hated her [Stephanie]. He hated the attention that she was getting."

This is Stephan's statement as aired on 48 Hours. Plaintiffs contend that this statement is false, as evidenced by Michael Crowe's declaration, in which he states that he did not hate his sister and in fact loved his sister. However, the preliminary issue, which is one for the court, is whether the statement is

susceptible of a defamatory meaning pursuant to § 46(1). *See Kahn,* 232 Cal.App.3d at 1608, 284 Cal.Rptr. 244.

As noted, in deciding whether a statement is defamatory, one cannot focus on snippets taken out of context. *See Kaelin,* 162 F.3d at 1040. The above statement is a portion of a sentence that comes from the following colloquy:

> Q. What was the motive for murdering Stephanie Crowe?
>
> A. The motive *as laid out by the confession*[38] *and as corroborated by other evidence* was that Stephanie was such a delightful girl. She was an angel by all accounts. She - just to look at her face while alive is to smile. She's the kind of person that brings out everything good and touched people. She was a wonderful little girl.
>
> The motive *as laid out by the confession* – it's not my motive that I created. You just go by the evidence that you have – is that her brother hated her, that he

[38] A reading of the entire transcript of defendant Stephan's interview reveals that the confession to which she was referring was that portion of Joshua Treadway's statements to police that the trial court deemed to be voluntary.

> hated the attention that she was getting. He hated Stephanie.

Transcript of 48 Hours Interview, pp. 34:18-35:3 (Exhibit 12, NOL of Exhibits in Support of Defendant Summer Stephan's MSJ/Special Motion to Strike/ Request for Attorney Fees and Costs) (emphasis added).

Regardless of whether Michael Crowe hated or loved his sister, defendant Stephan's actual statement, considered in context, is not a defamatory statement within the meaning of the California Civil Code § 46(1) because this statement is not reasonably susceptible of the interpretation that Michael killed Stephanie Crowe. While this statement is reasonably susceptible of being interpreted as a statement *that there was evidence* that Michael Crowe had a motive for killing Stephanie and that the motive was that he hated her, such a statement does not fall within § 46(1), as such a statement is distinct from a statement charging Michael Crowe with Stephanie's killing. Moreover, it is undisputed that there was evidence that Michael Crowe had a motive for killing Stephanie, regardless of whether he actually held that motive. Accordingly, defendant Stephan is entitled to summary judgment to the extent that plaintiffs' claims are predicated upon this statement.

(b) *"The behavior of the brother [Michael] seemed in contrast to the rest of the family. He was playing with some hand held game while the rest of the family was grieving."*

This contested statement is not reasonably susceptible of the interpretation that Michael killed Stephanie. Therefore, this statement does not fall within the definition of defamation set forth in Civil Code § 46(1).

(c) *"The motive started out as this hate, but then it turned into a sort of game of, 'Let's plan this out.' 'Let's see if it can be pulled off.'"*

In response to the question "He hated her?" defendant Stephan answered as follows:

A. *According to the confession.* I can only go by the evidence that I have at the time. And the evidence that I have is not evidence that I make up. It's evidence that exists, either through the confession, through the computer story,[39] through other avenues where evidence comes about.

In this case, the confession as well as the computer story as well as other corroborating evidence showed this motive, and

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[39] *See* footnote 5.

> *then showed that, through the confession, that the motive started out as this hate, but then it turned into sort of a game of let's plan this out. Let's see if it can be pulled off. . . .*

Transcript of 48 Hours Interview, pp. 37:19-38:6 (emphasis added). The implied assertion of objective fact here is not that Michael Crowe killed Stephanie but that there was a basis for the prosecution because *the confession and other evidence showed* that the motive for the crime started out as hate but that it turned into a game. Such a statement is not a statement within the meaning of § 46(1), because such a statement does not charge the boys with Stephanie's murder. Moreover, it is undisputed that this is what Joshua's confession showed regarding the motive, whether Joshua's confession was true or not. Therefore, defendant Stephan is entitled to summary judgment to the extent that plaintiffs' claims are predicated upon this statement.

> *(d) "There's a person that starts the ball rolling. And then you have people who climb onto the ship."*

The above statement was made during the following colloquy:

> Q. But, I mean, it is hard to believe that an older brother could hate his little sister who was, by all accounts, this angel-like child so much that he would recruit his

friends, plot out a meticulous killing, carry it out. It's hard to believe.

A. It's very hard to believe, and it would have been, I think, very easy for investigators and police at the time to just try to pin the murder on the transient right away.

I think it would be a lot easier to try to convict a transient who doesn't have a family than it is to try to convict three intelligent young men with families.

. . .

Now, it's possible that this transient did it. It's possible that the evidence against these three boys will remain and we'll continue to show that they did it.

All of those things are possible, and we're ready to accept wherever the evidence takes us.

Q. But as the evidence back then seems to be falling into place in your mind against these three boys, do you ask yourself, are they all evil? Is it Michael and Joshua and Aaron? How could they all be evil and do this?

A. *Well, we've seen in our system many cases where there's a person that starts the ball rolling and the you have people who climb on to the ship.* Many of the murders are such that not everyone is equally responsible.

> Legally, everyone is responsible for the murder, but that's the way it is. Sometimes it's peer pressure. Sometimes it's out of loyalty or friendship, or if we were to believe the confession of Joshua Treadway, the one that's been held to be both admissible and absolutely voluntary by the judge, if you were to hear him on videotape calmly relay the reason he went along is for friendship and because he was a little bit afraid of the others. So that's what I have to go on, is the evidence that's there.

Transcript of 48 Hours Interview, pp. 39:10-40:21 (emphasis added).

The boys' contentions to the contrary not withstanding, defendant Stephan did not actually state that one of the boys "started the ball rolling" with respect to Stephanie's murder, nor is her statement susceptible of such an interpretation. As noted *supra,* a speaker's statements must be considered in context. *See Kaelin,* 162 F.3d at 1040; *Selleck,* 166 Cal.App.3d at 1131, 212 Cal.Rptr. 838; *Corman,* 211 Cal.App.2d at 131-2, 27 Cal.Rptr. 327. The question posed to defendant Stephan clearly was not seeking an assertion of objective fact, implied or otherwise, regarding the boys' involvement in the murder but rather was seeking insight into the thought process of those involved in the investigation and prosecution of the boys. Moreover, immediately prior to answering this question, *defendant Stephan specifically stated that it*

was possible that Tuite committed the murder. Transcript of 48 Hours Interview, p. 39:27.

Finally, it should be noted that prior to this particular line of questioning, Stephan had detailed the evidence that was consistent with the boys committing the crime, which included an FBI report,[40] a confession by Treadway,[41] a knife found under Treadway's bed that a leading pathologist concluded was the type of knife used in the killings,[42] and three statements by juveniles with whom Crowe was housed in juvenile hall who had stated that Crowe had confessed to murdering his sister.[43] Read in context, defendant Stephan's statement about the "ball rolling" cannot be interpreted as a statement that the boys committed the murder. Rather, this statement was a generalized statement regarding how it is that individuals one would never expect get

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[40] Defendant Stephan's reference to this report can be found on page 15, lines 4-10 of the transcript of her 48 Hours interview. The report is Exhibit 24 to NOL of Exhibits in Support of Defendant Summer Stephan's MSJ/Special Motion to Strike/ Request for Attorney Fees and Costs.

[41] Defendant Stephan's reference to the confession can be found on page 14, lines 13-17 of the transcript of her 48 Hours interview.

[42] Defendant Stephan's reference to the knife and the pathologist's conclusion can be found on page 14, lines 18-25 of the transcript of her 48 Hours interview.

[43] Defendant Stephan's reference to the statements by the juveniles housed with Crowe can be found on page 14, lines 26 through page 15, line 4 of the transcript of her 48 Hours interview.

involved in horrific crimes, which statement was made in the context of a larger discussion regarding why the investigation focused on the boys.

Because defendant Stephan's statement, considered in context, does not impliedly assert that the boys killed Stephanie Crowe and therefore does not fall within the meaning of Civil Code § 46(1), defendant Stephan is entitled to summary judgment to the extent that the boys' claims are predicated upon this statement.

> (e) *"I don't think it's the cause of murder in any way, but I think it shows us a way that minds can come to – to plan an event. And in these games, it happens to usually be an event to kill or destroy the enemy."*

Plaintiffs contend that this statement is false because, according to Michael Crowe's declaration, none of the boys were influenced to commit murder by computer games because none of them ever had it in their minds to kill Stephanie or anyone else. Again, however, the preliminary issue, which is one for the court, is whether the statement is susceptible of a defamatory meaning pursuant to § 46(1). *See Kahn,* 232 Cal.App.3d at 1608, 284 Cal.Rptr. 244.

The statement comes from the following colloquy:

Q: How significant were the video games?

A. By themselves, they are not evidence. But as they serve to support and corroborate the confession, they are important.

They serve to show how someone could pull off this murder undetected. You know, the information we had was that these young men practiced on a daily basis killing scenarios and how to beat the enemy and how to be able to pull it off.

Q: On these video games?

A. On video or Dungeons or Dragons. We were told that they were able to have a scenario that would go on for two months and they're able to keep it all in their own mind, the Dungeons and Dragons killing scenarios.

That showed a level of intelligence and that showed a level of being able to plan and keep information in your mind. And looking at the crime scene and how somebody could commit this murder, be undetected, not leave any evidence and leave undetected seemed to corroborate, fit in and show that this is something that mentally there were capable of doing.

Again, I'm not saying that they did it at this point. It's an open investigation.

. . .

I think that the Dungeons and Dragons game, just looking through history, there has been several cases – several murder cases – that have been connected with people playing that game.

. . .

I don't think it's the cause of murder in any way, but I think it shows us a way that minds can come to plan an event and, in these games, it happens to usually be an event to kill or destroy the enemy.

Q. So under that scenario, under that early on scenario of the case, this started out as a game and ended up as murder?

A. ***According to the confession. . . .***

Transcript of 48 Hours Interview, pp. 48:25-51:4 (emphasis added). Defendant Stephan's statements, read in context, are not defamatory because they cannot be considered as implying the factual assertion that the boys killed Stephanie Crowe. In fact, defendant Stephan was careful during her statements on the topic of games to specifically state that she was not saying that the boys committed the murder. *See* Transcript of 48 Hours Interview, p. 49:20-21 ("Again, I'm not saying that they did it at this point. It's an open investigation."). Rather, it is clear that Stephan was explaining the thought process of those investigating the murder and the significance she

and the investigators placed on the fact that the boys played games such as Dungeons and Dragons. Consequently, defendant Stephan is entitled to summary judgment to the extent that plaintiffs' claims are premised on this statement.

(f) Statements regarding Tuite

During her 48 Hours interview, defendant Stephan made the following statements:

* "All of his [Tuite's] history, including mental history, showed a pattern of someone who cannot focus."

* "This was a highly organized crime. One where someone can stealthily come in, murder a girl in her sleep without anybody waking up. He [Tuite] was not a good candidate for pulling off a crime like this."

* "He [Tuite] wasn't just ignored and put on a shelf. After all, he was brought to the police station. He was interrogated. He was interrogated two times."

* "The shirt was heavily sp – stained. It's a transient's shirt. It's stained – it has stains of blood under three millimeters in diameter."

* "He [Tuite] attempted that burglary using a black plastic fish. That is what this man had as a burglary weapon."

None of these statements are actionable, as none of these statements are reasonably susceptible of the interpretation that *the boys* committed the murder. These statements in no way reference the boys. Moreover, it must, again, be emphasized that whether a statement is susceptible of a defamatory meaning requires an examination of all of the speaker's statements considered as a whole, not on "snippets taken out of context." *Kaelin,* 162 F.3d at 1040; *see also Selleck,* 166 Cal.App.3d at 1131, 212 Cal.Rptr. 838; *Corman,* 211 Cal.App.2d at 131-2, 27 Cal.Rptr. 327. These references to Tuite were made in the context of an interview in which defendant Stephan continually made it clear that she was uncertain as to who had committed the crime and that Tuite remained a suspect. For example, in discussing her belief that the case would have a conclusion, she explained:

> The conclusion might be that the young men will face justice. The conclusion might be that the transient will face justice. It might be that another person will face justice.

Transcript of 48 Hours Interview, p. 6:9-12. When asked about the possible reasons why Stephanie's blood was found on Tuite's red shirt, defendant Stephan answered:

> One, the transient killed Stephanie Crowe, and if he did, then he should be brought to justice and we hope to do that.

Transcript of 48 Hours Interview, p. 11:24-26. Defendant Stephan also specifically stated that she was not saying that Tuite was incapable of committing the crime. Transcript of 48 Hours Interview, p. 33:20-22. Finally, near the end of the interview, when asked whether she believed the boys did it but she just could not prove it, defendant Stephan answered:

> I'm not saying that at all. I am saying that we have to start from the beginning. No one in – the young men, the transient and maybe others out there are potential suspects in this case.

Transcript of 48 Hours Interview, p. 77:23-26.

In sum, defendant Stephan's remarks about Tuite are not "reasonably susceptible of a defamatory meaning," *Kaelin,* 162 F.3d at 1040, as her remarks regarding why Tuite was an unlikely suspect cannot be rationally interpreted as implying that instead it was *the boys* who killed Stephanie. Accordingly, these remarks cannot be the basis for a state law defamation claim, and defendant Stephan is entitled to summary judgment to the extent that plaintiffs' claims are predicated upon these statements.

Finally, in support of their claims, the boys point to two other statements which defendant Stephan made to "48 Hours" but which were not broadcast. The first such statement was in response to why there wasn't a rush to charge Tuite:

> When we have three juveniles that say that the brother had confessed to them the

> murder of his sister? Three separate juveniles who tell us that without receiving any benefit. They were on their way out of juvenile hall or already out of juvenile hall, so they were not expecting any favor in return.

Transcript of 48 Hours Interview, pp. 14:26-15:3. The boys contend that this was a false statement because one of the juveniles who told the police that Michael had confessed to the crime was awaiting trial in a double murder in which he had been charged as an adult, and therefore he expected leniency for his testimony. Regardless of the truth of defendant Stephan's statement that none of the juveniles expected any favor in return for their statements to police, this statement is not defamatory within the meaning of Civil Code § 46(1) because it is not a statement charging the boys with a crime but rather an explanation regarding why someone else was not charged with that crime.

Finally, the boys point to the following statement by Stephan:

> [T]he most compelling piece of evidence . . . that made the police focus more on the brother in this case was a statement he made . . . The brother told his family and told the police that he woke up at 4:30 in the morning and that he turned on his TV light . . . and that he got out of his room . . . and that his sister's door was closed at that time and he saw nothing amiss . . . The investigation showed that it is pretty much not reasonable that somebody could walk our of

> their room at 4:30 and not see the body there and that it would not be truthful to say that her door was shut because the evidence shows that her door was open because her body blocked the doorway where it couldn't be closed.

Transcript of 48 Hours Interview, pp. 19:21-20:22.

This statement is not defamatory within the meaning of Civil Code § 46(1) because it is not a statement charging Michael Crowe with Stephanie's murder. Rather, it was a comment on the evidence and the reasoning of the police. Moreover, for reasons set forth in detail in section I.D. *supra*, Michael's statement to the police that he awoke at 4:30 a.m. and saw that Stephanie's door was closed was the most compelling piece of evidence against him, and no reasonable factfinder could find otherwise.

Defendant Stephan seeks summary judgment on the alternative ground that her statements are privileged under California law. Because the court concludes that the challenged statements made by defendant Stephan are not actionable because, as a matter of law, they are not defamatory within the meaning of § 46(1), the court need not address defendant Stephan's arguments regarding privilege.

Finally, because the court grants defendant Stephan's motion for summary judgment, her motion to strike pursuant to California's Anti-SLAPP statute is denied as moot, as is her motion for attorney's fees pursuant to that statute.

2. Section 1983 "Defamation Plus"

In order to maintain a cognizable § 1983 claim based on defamation, a plaintiff must demonstrate the loss of a property or liberty interest rooted in the constitution in conjunction with injury to reputation. *See Cooper v. Dupnik,* 924 F.2d 1520, 1532 (9th Cir.1991), *vacated on other grounds,* 963 F.2d 1220 (9th Cir.1992). As the Ninth Circuit has explained, a § 1983 claim for defamation-plus may be proved either by demonstrating that the plaintiff suffered an injury to reputation that was inflicted in connection with the violation of a federally protected right or by demonstrating that the plaintiff's injury to reputation caused the denial of a federally protected right. *See Herb Hallman Chevrolet v. Nash-Holmes,* 169 F.3d 636, 645 (9th Cir.1999).

Defendant Stephan is entitled to summary judgment with respect to the boys' § 1983 defamation-plus claims because, as set forth *supra,* as a matter of law her challenged statements were not defamatory. Moreover, even if the above statements could be deemed defamatory, given the painstaking manner in which defendant Stephan attempted to tie her remarks to the evidence of record and consistently indicated that the identify of the murderer was up in the air, no reasonable prosecutor could have believed that she was violating the boys' federal constitutional rights by making the statements uttered by defendant Stephan. *See Saucier,* 533 U.S. at 201, 121 S.Ct. 2151 (emphasizing that the inquiry regarding whether the law was clearly established "must be

undertaken in light of the specific context of the case, *not as a broad general proposition. . . .*") (emphasis added). Accordingly, defendant Stephan is entitled to summary judgment with respect to the boys' § 1983 defamation-plus claims.

B. Defendant Blum

Defendant Blum is a private clinical psychologist. Defendant Blum was consulted by defendant Anderson on January 23, 1998 about an interview the police were going to conduct with Michael Crowe. *See* Blum Decl. ¶ 13. Defendant Blum was present during at least portions of plaintiff Michael Crowe's January 23 interview. Defendant Anderson also requested that defendant Blum render an opinion regarding a phone call between Aaron Houser and Joshua Treadway.

Defendant Claytor testified in his deposition in this case that defendant Blum assessed plaintiff Aaron Houser as "exhibiting sociopathic tendencies." *See* Ralph Claytor DT p. 562:10-12 (one of several exhibits attached as Exhibit C to Plaintiffs' Responses to Blum's Separate Statement of Undisputed Material Facts in Support of MSJ, or in the Alternative, Partial Summary Judgment). Defendant Claytor also testified that defendant Blum told the Escondido Police Department that "He is a Charles Manson with an IQ." *Id.* at p. 566:13-17. In addition, defendant Blum admitted in his own deposition that during a phone call with defendant Anderson on January 31, 1998, defendant Blum stated that he thought that

plaintiff Aaron Houser was a "Charlie Manson wannabe" and that he was "highly manipulative and controlling." Lawrence Blum DT pp. 34:3-36:7 (attached as Exhibit B to Plaintiffs' Responses to Blum's Separate Statement of Undisputed Material Facts in Support of MSJ, or in the Alternative, Partial Summary Judgment).

1. State law defamation

Because the only allegedly-defamatory statements made by defendant Blum concern Aaron Houser, defendant Blum's motion for summary judgment with respect to Michael Crowe's and Joshua Treadway's defamation claims is granted.

Plaintiff Aaron Houser contends that the statements that he is a "Charlie Manson wannabe" and "Charles Manson with an IQ" are statements accusing him of Stephanie's murder, and therefore they are defamatory under California Civil Code § 46(1). Defendant Blum moves for summary judgment on the ground that the statements he made are "rhetorical hyperbole, vigorous epithets, lusty and imaginative expressions, or language used in a loose figurative sense which are protected non-actionable opinion." Defendant Lawrence N. Blum's Memorandum of Points and Authorities in Support of MSJ, or in the Alternative, Partial Summary Judgment p. 16:24-26.

As discussed *supra,* a speaker is not protected from a defamation claim simply because a statement is couched in terms of an opinion. *See Kahn,* 232

Cal.App.3d at 1607, 284 Cal.Rptr. 244 (explaining that "'whether a reasonable fact finder could conclude that the published statements imply a provably false factual assertion'" is the "dispositive question" in determining whether a statement is defamatory) (quoting *Moyer,* 225 Cal.App.3d at 720, 275 Cal.Rptr. 494). On the other hand, certain types of opinions are not reasonably susceptible to an interpretation which is capable of being proven true and false and therefore are not actionable. In particular, "'rhetorical hyperbole,' 'vigorous epithets[s],' 'lusty and imaginative express[s] of . . . contempt,' and language used 'in a loose, figurative sense'" have all been found to be unactionable statements protected by the First Amendment. *Ferlauto v. Hamsher,* 74 Cal.App.4th 1394, 1401, 88 Cal.Rptr.2d 843 (1999) (quoting *Greenbelt Pub. Assn. v. Bresler,* 398 U.S. 6, 14, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970)).

Clearly, defendant Blum's figurative statement comparing Aaron Houser to Charles Manson is not a statement resting on an assertion of objective fact that is capable of being proven true or false. Therefore, this statement is not actionable. *See Underwager v. Channel 9 Australia,* 69 F.3d 361, 367 (9th Cir.1995) (statement that plaintiff was "intrinsically evil" was not an assertion capable of verification); *Gilbrook,* 177 F.3d at 862 (reference to plaintiff as a "Jimmy Hoffa" was "the type of 'colorful, figurative rhetoric that reasonable minds would not take to be factual'" and "was not sufficiently susceptible of being proved true or false" and therefore was not

actionable) (quoting *Underwager,* 69 F.3d at 367); *Ferlauto,* 74 Cal.App.4th at 1403, 88 Cal.Rptr.2d 843 (use of phrase "Kmart Johnny Cochran" to describe a lawyer was "a lusty and creative expression of contempt, too loose and figurative to be susceptible of being proved true or false").

Moreover, given that defendant Blum, a psychologist, was speaking to police officers who were investigating Stephanie's murder and who had sought defendant Blum's professional advice, the police officers surely would have interpreted this statement as a comment on Aaron Houser's psychological profile and not as a statement that Houser was guilty of Stephanie's murder. *See Kahn,* 232 Cal.App.3d at 1608, 284 Cal.Rptr. 244 (explaining that in determining whether a statement is actionable, California courts consider the "totality of the circumstances," including "'the knowledge and understanding of the audience to whom the publication was directed'") (quoting *Moyer,* 225 Cal.App.3d at 724, 275 Cal.Rptr. 494 (in turn quoting *Baker,* 42 Cal.3d at 260-1, 228 Cal.Rptr. 206, 721 P.2d 87)). *Cf. Weiner v. San Diego County,* 210 F.3d 1025, 1031-2 (9th Cir.2000) (holding that district attorney's statement was not defamatory because district attorney's audience "would likely view his statement as an attempt to explain that it was not because the prosecution did a bad job that the case was lost" and not as a statement that the acquitted defendant was actually guilty). However, a statement regarding Aaron's psychological profile is not defamatory pursuant to § 46(1).

Finally, the statement about plaintiff Houser being a "sociopath" is not a statement charging plaintiff Houser with a crime pursuant to § 46(1), and plaintiff Houser fails to identify any other basis for claiming that the comment about him being a sociopath is defamatory.

Accordingly, defendant Blum is entitled to summary judgment with respect to Aaron Houser's defamation claim.

2. Section 1983 Defamation-Plus

The court previously ruled that only plaintiff Aaron Houser can potentially state a § 1983 defamation-plus claim against defendant Blum. *See* July 26, 2000 Order p. 15:17-21.

Because the statements made by defendant Blum with respect to plaintiff Aaron Houser are not defamatory under California law, they cannot be the basis of a federal § 1983 "defamation-plus" cause of action. Accordingly, defendant Blum is entitled to summary judgment with respect to this claim brought by Aaron Houser.

C. Defendant Sweeney

1. Defamation

In his motion, defendant Sweeney contends that "[t]he only supposedly defamatory statement attributed to Sweeney is that he allegedly told an unnamed acquaintance of the Houser family that

Aaron was guilty of murdering Stephanie Crowe, and that he vacillated between psycho and normal like a character in the film Primal Fear." Memorandum of Points and Authorities in Support of Defendant Barry Sweeney's MSJ or in the Alternative, Partial Summary Judgment p. 16:13-15. The boys apparently do not dispute that this alleged statement provides the basis for their claims against defendant Sweeney. Because plaintiffs Michael Crowe and Joshua Treadway are not referenced in this statement, defendant Sweeney is entitled to summary judgment with respect to the Michael Crowe's and Joshua Treadway's defamation claims.

Defendant Sweeney contends that the statements he allegedly made against Aaron are not defamatory because they are statements of opinion, not fact. As noted *supra,* the test is not whether Sweeney's statements can be characterized as statements of opinion but rather "'whether a reasonable fact finder could conclude that the published statements imply a provably false factual assertion.'" *Kahn,* 232 Cal.App.3d at 1607, 284 Cal.Rptr. 244 (quoting *Moyer,* 225 Cal.App.3d at 724, 275 Cal.Rptr. 494).

Here, the statement that Aaron Houser was guilty of murdering Stephanie Crowe, even if couched as an opinion, was made to a civilian by a police officer with inside knowledge regarding the investigation of Stephanie's murder. A reasonable fact-finder could find that such a statement by such an officer implied a factual assertion which is, theoretically at least, capable of being proven true or false.

Accordingly, such statement is actionable, and defendant Sweeney is not entitled to summary judgment with respect to this statement.

On the other hand, the statement likening Aaron Houser to the character in Primal Fear is "too loose and figurative to be susceptible of being proved true or false." *Ferlauto,* 74 Cal.App.4th at 1403, 88 Cal.Rptr.2d 843 (reference to attorney as a "Kmart Johnnie Cochran" not actionable); *see also Gilbrook,* 177 F.3d at 862 (reference to plaintiff as a "Jimmy Hoffa" not actionable). Thus, defendant Sweeney is entitled to summary judgment with respect to Aaron Houser's defamation claim to the extent that it is predicated upon this statement.

The court notes that plaintiff Houser has failed to oppose defendant Sweeney's motion. The court has the discretion to deem this failure to oppose this motion a consent to its granting, *see* Local Rule 7.1.(f.3.c); however, because defendant Sweeney's analysis regarding the first challenged statement is not supported by the law, the court will not grant the motion on that ground. The court also notes that, in his reply, defendant Sweeney contends that he is entitled to summary judgment because plaintiff Houser has failed to identify "specific facts showing that there is a genuine issue for trial." Rule 56(e); *see also* Rule 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). However, this argument comes too late. *See Eberle v. City of Anaheim,* 901 F.2d 814, 817 (9th Cir.1990) (refusing to consider argument raised for first time in reply

brief). Nowhere in his motion does defendant Sweeney contend that there is an absence of evidence from which a reasonable factfinder could find that he made the statements plaintiff Houser attributes to him. Rather, defendant Sweeney simply argues that as a matter of law the statements attributed to him were not defamatory. Because plaintiff Houser was not placed on notice that he was required in his opposition to come forth with evidence demonstrating that this alleged statement was actually made, it would be inappropriate at this time to grant summary judgment based on his failure to do so.

2. Section 1983 "Defamation-Plus"

Because the only allegedly-defamatory statements made by defendant Sweeney pertain to Aaron Houser, defendant Sweeney is entitled to summary judgment with respect to Michael Crowe's and Joshua Treadway's § 1983 defamation-plus claims.

As for Aaron Houser's claim, as noted *supra,* the statement likening Aaron Houser to a character in a movie is not defamatory because it cannot be interpreted as implying a provably false factual assertion. Therefore, plaintiff Aaron Houser's § 1983 defamation-plus claim fails to the extent that it is predicated upon this statement.

As noted, the statement that Aaron killed Stephanie is a statement upon which a defamation claim may be predicated. However, defendant Sweeney contends that Aaron Houser cannot demonstrate that

the alleged injury to reputation resulting from Sweeney's alleged statements was inflicted in connection with a federally protected right or caused the denial of a federally protected right as required by Ninth Circuit case law. *See Herb Hallman Chevrolet v. Nash-Holmes,* 169 F.3d 636, 645 (9th Cir.1999). The requisite connection between the alleged injury to reputation and the denial of a federally protected right is not readily apparent, and plaintiff Aaron Houser has failed to address the existence of such a connection. Accordingly, the court deems plaintiff Houser's failure to address this argument as a concession that he is unable to make this showing. Therefore, defendant Sweeney is entitled to summary judgment with respect to Aaron Houser's § 1983 defamation-plus claim.

VI. Eighth Claim for Relief – Municipal Liability for Violation of § 1983

A. City of Oceanside

As explained *supra,* defendant McDonough, an employee of the City of Oceanside, is entitled to summary judgment with respect to all of the plaintiffs' claims because the record is devoid of evidence from which a reasonable factfinder could find defendant McDonough liable for violating the plaintiffs' constitutional rights. Accordingly, the City of Oceanside is entitled to summary judgment as well. *See Quintanilla v. City of Downey,* 84 F.3d 353, 355-6 (9th Cir.1996) (district court did not err in entering

judgment on *Monell* claim for the chief of police and city solely on the basis of the jury's finding that the individual officers did not violate plaintiff's constitutional rights); *City of Los Angeles v. Heller,* 475 U.S. 796, 799, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986) ("[N]either *[Monell],* nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm. If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point.")

B. City of Escondido

The City of Escondido moves for summary judgment, arguing that it cannot be liable for violation of the boys' Fifth Amendment rights. As set forth in section II, *supra,* the boys did not suffer a violation of their Fifth Amendment rights. Accordingly, the City's motion for summary judgment is granted with respect to this claim. *See Quintanilla,* 84 F.3d at 355-6; *Heller,* 475 U.S. at 799, 106 S.Ct. 1571.

VII. Ninth Claim for Relief – False Arrest/ False Imprisonment

The boys bring a state law claim for false arrest/false imprisonment against defendants Wrisley, Claytor, Anderson, Blum, McDonough and Stephan.

A. Joshua Treadway's and Aaron Houser's Claims

Under California law, no cause of action may be brought against a police officer for false arrest or false imprisonment arising out of any arrest when "[t]he arrest was lawful, or the peace officer, at the time of the arrest, had reasonable cause to believe the arrest was lawful." California Penal Code § 847. Penal Code § 836(a)(3) provides that a warrantless arrest is lawful when a police officer has "probable cause to believe that the person to be arrested has committed a felony, whether or not a felony, in fact, has been committed." As is the case with federal law, California law provides that "the court must look to the facts known to the peace officer at the time of the arrest" in determining whether there is probable cause for a warrantless arrest. *Giannis v. City and County of San Francisco,* 78 Cal.App.3d 219, 224, 144 Cal.Rptr. 145 (1978). "The issue of whether an arrest was made with reasonable cause is an issue of law to be decided by the court." *Id.* at 225, 144 Cal.Rptr. 145.

For the reasons set forth in section I.D., *supra,* defendants had reasonable cause to believe the Joshua Treadway's and Aaron Houser's arrests were lawful.

Therefore, California Penal Code § 847 shields defendants from liability for Joshua Treadway's and Aaron Houser's arrests. Accordingly all of the defendants are entitled to summary judgment with respect to Joshua Treadway's and Aaron Houser's claims for false arrest/false imprisonment.

B. Michael Crowe's Claim

Defendants Wrisley, Claytor and Anderson do not seek summary judgment with respect to Michael Crowe's claim for false arrest/false imprisonment. Defendants Blum, McDonough and Sweeney do seek summary judgment with respect to Michael Crowe's false arrest/false imprisonment claim, although they do not base their motion on the ground that there was probable cause to arrest Michael Crowe. The court now turns to their arguments.

Defendant Blum moves for summary judgment on the ground that he did not arrest the boys. It is undisputed that defendant Blum did not arrest the boys. However, because plaintiffs are attempting to proceed under a conspiracy theory, the court must determine whether there is a genuine issue of material fact as to whether defendant Blum was a member of the conspiracy alleged by plaintiffs. Because this is a state law claim, the court looks to state conspiracy principles.

Under California law, civil conspiracy "is not a tort but rather a theory of joint liability whereby all who cooperate in another's wrong may be held liable."

Thompson v. California Fair Plan Ass'n, 221 Cal.App.3d 760, 767, 270 Cal.Rptr. 590 (1990). *See also 117 Sales Corp. v. Olsen,* 80 Cal.App.3d 645, 649, 145 Cal.Rptr. 778 (1978) ("The advantage to the pleader in charging a conspiracy is to implicate all participating in the common design and thus fasten liability on him who agree to the plan to commit the wrong as well as on him who carried it out.") "To be entitled to a joint recovery of damages against the defendant for inflicting a wrong through a conspiracy, the plaintiff must allege and prove: a concert of action between the defendants to accomplish the purpose of the conspiracy; that their actions were illegal and in furtherance of a common scheme or design to achieve the unlawful purpose of the conspiracy; and their knowledge of the conspiracy and its unlawful purpose." *James v. Herbert,* 149 Cal.App.2d 741, 747, 309 P.2d 91 (1957). Liability for a civil conspiracy "attaches only for action taken pursuant to the conspiracy." *Thompson,* 221 Cal.App.3d at 767, 270 Cal.Rptr. 590.

"Because civil conspiracy is so easy to allege, plaintiffs have a weighty burden to prove it." *Choate v. County of Orange,* 86 Cal.App.4th 312, 333, 103 Cal.Rptr.2d 339 (2000). As the California Court of Appeal has explained:

> It is not enough that the conspiring officers knew of an intended wrongful act, they must agree – expressly or tacitly – to achieve it. Unless there is such a meeting of the minds, "'the independent acts of two or more wrongdoers do not amount to a conspiracy.'"

> (*National Congress for P.R. Rights v. City of New York* (S.D.N.Y.1999) 75 F.Supp.2d 154, 168.). "Bare" allegations and "rank" conjecture do not suffice for a civil conspiracy. (*Mahaney v. Warren County* (8th Cir.2000) 206 F.3d 770, 772.)

Choate, 86 Cal.App.4th at 333, 103 Cal.Rptr.2d 339.

As noted in section I.A., *supra,* plaintiffs allege that there was a "common objective to convict and incarcerate the boys" and that defendant Blum was a part of this "scheme to blame and punish the boys" for Stephanie's murder. *See* Plaintiffs' Memorandum of Points and Authorities in Opposition to Lawrence N. Blum's Motion for Summary Judgment, or in the Alternative, Partial Summary Judgment p. 7:3-4 and 8-9. According to plaintiffs, the objective of the conspiracy was to be accomplished by means of illegal interrogations, arrests, searches, and seizures.

Here, although defendant Blum participated in the interrogation of the boys, there is absolutely no evidence that he was even aware of the alleged conspiracy or its objectives, let alone that he was a part of this conspiracy. Because participation in a conspiracy "is difficult to prove by direct evidence, it can be inferred from the nature of the act done, the relation of the parties, the interest of the alleged conspirators, and other circumstances." *Black v. Sullivan,* 48 Cal.App.3d 557, 566-567, 122 Cal.Rptr. 119 (1975). However, none of these factors suggest defendant Blum's participation in the alleged conspiracy.

First, defendant Blum did not have a prior relationship with the other defendants from which one could infer that he was a participant in the alleged conspiracy to wrongfully arrest the boys or that he would have any interest in participating in a conspiracy which, plaintiffs contend, was directed at protecting Officer Walters and the Escondido Police Department from criticism.

Second, the alleged wrongful acts which directly support this claim – the arrests of the boys – are in the nature of a police function and are acts that defendant Blum himself did not perform. The act which defendant Blum did perform was the provision of professional advice regarding how best to interrogate a suspect. One cannot infer from the limited nature of this act that defendant Dr. Blum was a participant in a greater conspiracy to "convict and incarcerate" by means of an illegal arrest.

Finally, it should be emphasized that even if by giving the advice he gave, defendant Blum violated the boys' Fifth Amendment rights (which the court has concluded he did not), to be held liable for false arrest/false imprisonment, the evidence must disclose not only that defendant Blum's actions were illegal but that his conduct was "in furtherance of a common agreement or understanding to achieve the unlawful purpose of" the Escondido defendants. *See Angelus Securities Corp. v. Ball,* 20 Cal.App.2d 423, 432, 67 P.2d 152 (1937) (for defendants to be held liable under a conspiracy theory "the evidence must disclose not only that their actions in selling their stock and

receiving corporate securities in exchange therefor was illegal, *but that the conduct of [the defendants] was in furtherance of a common agreement or understanding to achieve the unlawful purpose of the directors who negotiated the stock purchase.*") (emphasis added). As stated, there is simply no evidence that defendant Blum's participation in the interrogation of Michael Crowe, whether constitutional or not, was in furtherance of a common agreement or understanding to achieve the alleged unlawful purpose of the Escondido defendants in pursuing the arrests and prosecution of the boys.

Because no reasonable factfinder could find that defendant Blum was a participant in the alleged conspiracy, defendant Blum is entitled to summary judgment with respect to the boys' false arrest/false imprisonment claim. *See Id.* (trial court properly granted nonsuit where there was no evidence that the defendants were aware of the purpose of the alleged conspiracy and that their actions were in furtherance of an agreement to achieve the unlawful purpose of the alleged conspiracy). Because he is entitled to summary judgment on this ground, the court need not determine whether California Civil Code § 47(b) and (c) also provide a defense to this claim.

Defendant McDonough, like defendant Blum, is entitled to summary judgment with respect to all of the boys' claims for false arrest/false imprisonment. As with defendant Blum, plaintiffs seek to hold defendant McDonough liable under the theory that he was a participant in a "conspiracy to wrongfully

convict and incarcerate the boys for Stephanie's murder" in order to protect Officer Walters and the Escondido Police Department from the ramifications of Officer Walter's alleged failure to stop the murder of Stephanie Crowe. Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant Chris McDonough's Motion for Summary Adjudication/Judgment as to all Claims by Michael Crowe, Aaron Houser and Joshua Treadway p. 13:24-25. As with defendant Blum, there is no evidence from which it can be inferred that defendant McDonough was a member of such a conspiracy.

There is no evidence that defendant McDonough had a prior relationship with the Escondido defendants that would give him an interest in joining such a conspiracy, and there is no other evidence from which a reasonable factfinder could infer that he would have any interest in participating in such a conspiracy. It is undisputed that defendant McDonough, who is employed by the City of Oceanside, not the City of Escondido as are the other police officer defendants, was asked by the City of Escondido to assist in the interrogations of the boys because of his training using the CVSA, a machine which is sold as a "truth verification" device. This was the first time that defendant McDonough had been contacted by the City of Escondido to assist with an interrogation, and defendant McDonough had no other significant contacts with the Escondido defendants.

Moreover, although one could infer that defendant McDonough conspired with the Escondido defendants to coerce a confession from the boys, one cannot reasonably infer from his membership in this smaller conspiracy that McDonough was aware of and was a participant in a grand conspiracy to wrongfully arrest and prosecute the boys. Because there is no evidence from which a reasonable factfinder could infer that defendant McDonough was aware of the alleged conspiracy to wrongfully convict and incarcerate the boys, let alone that he was a member of it, defendant McDonough is entitled to summary judgment with respect to the boys' false arrest/false imprisonment claims.

Defendant Sweeney moves for summary judgment on the ground that he did not specifically participate in the boys' arrests. However, defendant Sweeney fails to address the boys' conspiracy allegations. Because defendant Sweeney has failed to demonstrate that there is no genuine issue of material fact as to whether he was involved in the alleged conspiracy, defendant Sweeney's motion is denied with respect to this claim.

VIII. Eleventh and Twelfth Claims for Relief – Intentional and Negligent Infliction of Emotional Distress

All of the plaintiffs bring California state law claims against defendants Blum, Wrisley, Sweeney, Claytor, McDonough and Anderson for intentional

and negligent infliction of emotional distress. It appears that these claims, like plaintiffs' claims for violation of the Fourteenth Amendment substantive due process clause, are predicated upon the interrogation and "strip searches" of the boys.

California Gov't Code § 821.6 provides that "[a] public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause." Although not apparent from the language of the statute, the California Court of Appeal has held that § 821.6 "is not limited to the act of filing a criminal complaint. Instead, it also extends to actions taken in preparation for formal proceedings." *Amylou R. v. County of Riverside,* 28 Cal.App.4th 1205, 1209-10, 34 Cal.Rptr.2d 319 (1994). "Because investigation is 'an essential step' toward the institution of formal proceedings, it 'is also cloaked with immunity.'" *Id.* at 1210, 34 Cal.Rptr.2d 319 (citing *Kemmerer v. County of Fresno,* 200 Cal.App.3d 1426, 1436-37, 246 Cal.Rptr. 609 (1988)). Thus, § 821.6 shields police officers from claims for emotional distress arising out of a criminal investigation. *See Amylou R.,* 28 Cal.App.4th at 1214, 34 Cal.Rptr.2d 319.

In *Amylou R.,* the plaintiff sued a county, contending that the actions of its officers in investigating a murder were tortious and constituted, *inter alia,* the intentional and negligent infliction of emotional distress. The plaintiff had told police that she and her friend were abducted and raped, and that her friend

was killed by the abductor but that she had been released. The police began to grow suspicious of her story and, according to the plaintiff, began telling her that she knew that she was lying and that if she refused to tell the truth they would tell everyone they knew she was lying, which would result in the loss of her friends. After the plaintiff refused to cooperate with police, they began questioning her friends and neighbors, telling them that the plaintiff was lying and suggesting that she was not a victim and was involved in the murders.

On appeal, the court concluded that officers were immune under § 821.6 because the acts of which the plaintiff complained "are incidental to the investigation of the crimes, and since investigation is part of the prosecution of a judicial proceeding, those acts were committed in the course of the prosecution of that proceeding." *Id.* at 1211, 34 Cal.Rptr.2d 319. It also concluded that this immunity is not limited to claims for injuries suffered by the target of the investigation but also shields officers from liability for injuries suffered by others. It then concluded that because the officers were immune under § 821.6, the county was immune pursuant to Gov.Code § 815.2(b), which provides that "[e]xcept as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability."

Here, as in *Amylou R.*, the acts giving rise to plaintiffs' claims – the interrogations and "strip

searches" of the boys – are incidental to the investigation of a crime. Because, as determined by the court in *Amylou R.,* investigation of a crime is part of the prosecution of a judicial proceeding, defendants are entitled to immunity pursuant to § 821.6. Plaintiffs have failed to even attempt to distinguish *Amylou R.,* which the court finds to be directly on point. Moreover, plaintiffs' reliance on *County of Los Angeles v. Superior Court of Los Angeles Court,* 78 Cal.App.4th 212, 92 Cal.Rptr.2d 668 (2000) for the proposition that § 821.6 only shields officers from liability for damages suffered after the judicial process begins is unavailing.

Unlike the plaintiff in *Amylou R.,* the plaintiffs in *County of Los Angeles* brought a claim for false arrest and false imprisonment, and unlike in *Amylou R.,* the issue in *County of Los Angeles* was the correct measure of damages in a false arrest/false imprisonment case. In the course of addressing this issue, the court of appeal had to determine how the immunity granted by § 821.6 affects the measure of damages in a false arrest/false imprisonment claim. Although California courts have refused to construe § 821.6 as providing immunity for false arrest or false imprisonment, *see Sullivan v. County of Los Angeles,* 12 Cal.3d 710, 720, 117 Cal.Rptr. 241, 527 P.2d 865 (1974), a false arrest/false imprisonment claim ends at the time an individual is arraigned, *see County of Los Angeles,* 78 Cal.App.4th at 221, 92 Cal.Rptr.2d 668, and once an individual is arraigned, the claim becomes one for malicious prosecution, a claim for

which § 821.6 provides immunity. *See id.* at 217, 92 Cal.Rptr.2d 668. The trial court in *County of Los Angeles* held that the plaintiffs could only recover damages for false arrest/false imprisonment for the period of time between their arrest and the time the district attorney filed a criminal complaint against them. The court of appeal disagreed. Distinguishing between injuries and damages, the court of appeal explained that although the plaintiffs were only entitled to recover for injuries incurred up until the time the criminal complaint was filed, if those injuries resulted in damages that accrued after the filing of the criminal complaint, such damages were recoverable.

County of Los Angeles is not on point with respect to the present claim, as it did not involve a claim for intentional or negligent infliction of emotional distress arising out of a police investigation but instead involved a damages issue raised in the context of a claim for false arrest/false imprisonment. Moreover, not only is *County of Los Angeles* not on point, but nothing in that opinion suggests *Amylou R.* is not good law for the proposition for which it is cited here. Because the holding of *County of Los Angeles* is inapplicable here, and because *Amylou R.* is directly on point, defendants' motions for summary judgment are granted with respect to the boys' claims for intentional and negligent infliction of emotional distress.

CONCLUSION

By its ruling, the court does not intend to minimize the pain that plaintiffs, particularly the Crowe plaintiffs, experienced not only from the tragedy of Stephanie's death but from defendants' actions. However, assuming for the moment that the boys were not involved in Stephanie's death, it is vital to note that "[t]he Constitution does not guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted – indeed, for every suspect released." *Baker,* 443 U.S. at 145, 99 S.Ct. 2689. As recognized by the Fourth Circuit,

> not every unfortunate incident gives rise to § 1983 liability against a municipality or its officials. The police must be held to standards of reasonableness, not to standards of perfection. A society that expects police officers to provide protection must afford them in turn some protection from lawsuits. If immunity is lost in every case of mistaken arrest, then many a perpetrator of violent crime will go unapprehended.

Torchinsky v. Siwinski, 942 F.2d 257, 264-5 (4th Cir.1991).

For the reasons set forth in the body of this Order,

Defendant Blum's Motion for Summary Judgment, or in the Alternative, Partial Summary Judgment [# 508-1 and -2] is granted.

Defendant Stephan's Motion for Summary Judgment [# 586-1] is granted. Defendant Stephan's Special Motion to Strike [# 586-2] and Request for Attorney Fees and Costs [# 586-3] are denied as moot.

Defendant McDonough's Motion for Summary Judgment of the Claims Asserted by Plaintiffs Stephen Crowe, Cheryl Crowe, Judith Kennedy, Shannon Crowe, Margaret Houser, Gregg Houser, Michael Lee Treadway, and Tammy Treadway [doc.# 500] is granted. Defendant McDonough's Motion for Summary Adjudication/Judgment as to All Claims by Michael Crowe, Aaron Houser and Joshua Treadway [# 538-1 and -2] is granted.

The City of Oceanside's Motion for Summary Judgment of the Monell Claims Asserted by All Plaintiffs [# 469] is granted.

The City of Escondido's Motion for Summary Judgment of the Claim Asserted by Michael Crowe [# 494] is granted.

Defendant Barry Sweeney's Motion for Summary Judgment or in the Alternative Partial Summary Judgment [# 389-1 and -2] is granted in part and denied in part. Specifically, it is granted with respect to all claims except the Crowes' Fourth Amendment claims, the Crowes' claims for violation of the right to companionship, and Aaron Houser's claim for defamation.

Escondido Defendants' Motion for Summary Judgment or in the Alternative Partial Summary

Judgment, of the Claims Asserted by the Treadway Plaintiffs [# 488-1 and -2] is granted.

Escondido' Defendants' Motion for Summary Judgment or in the Alternative, Partial Summary Judgment, of the Claims Asserted by the Houser Plaintiffs [# 448-1 and -2] is granted.

IT IS SO ORDERED.

175

Nos. 10-376, 10-377

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In The
Supreme Court of the United States

MARK WRISLEY, et al.,

Petitioners,

vs.

MICHAEL CROWE, et al.,

Respondents.

CHRISTOPHER MCDONOUGH,

Petitioner,

vs.

MICHAEL CROWE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

COMBINED BRIEF IN OPPOSITION TO PETITIONS OF MARK WRISLEY, ET AL., AND CHRISTOPHER MCDONOUGH

MILTON J. SILVERMAN, ESQ.
Counsel of Record
LAW OFFICE OF MILTON J. SILVERMAN
2404 Broadway
San Diego, CA 92102
Telephone: (619) 231-6611
Facsimile: (619) 231-6692
E-Mail: silvermanatlaw@aol.com

Counsel for Respondents
Michael Crowe, Stephen Crow, Cheryl Crowe, Shannon Crowe and Judith Ann Kennedy

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Respondents, and Plaintiffs below, are individuals Michael Crowe, Stephen Crowe, Cheryl Crowe, Shannon Crowe, and Judith Ann Kennedy (deceased) (the "Crowe" Respondents).

Additional Respondents and Plaintiffs below are Margaret Susan Houser, Gregg Houser, and Aaron Houser. The Houser Respondents are represented by separate counsel and intend to file their own separate opposition to the Petitioners' petitions.

Petitioner, and Defendant below, is individual Christopher McDonough.

Additional Defendants below, who filed a separate petition, are individuals Mark Wrisley, Barry Sweeney, Ralph Claytor, and Phil Anderson (collectively, the "Escondido Defendants").

Petitioner Lawrence Blum, Ph.D., has settled his case with the Crowe Respondents, and the Crowe Respondents are not filing a brief in opposition to Blum's petition.

Other Defendants below, who were dismissed from the case but named in the caption on appeal, are City of Oceanside, City of Escondido, County of San Diego, Summer Stephan, Gary Hoover, Rick Bass and the National Institute for Truth Verification, a Florida limited liability company.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT – Continued

Additional Plaintiffs below, who were dismissed from the case but named in the caption on appeal, are individuals Zachary Treadway, Joshua David Treadway, Michael Lee Treadway, Tammy Treadway, Janet Haskell, and Christine Huff.

There are no corporations involved in this proceeding.

TABLE OF CONTENTS

		Page
I.	INTRODUCTION	1
II.	ISSUES PRESENTED	9
III.	ARGUMENT	11
	A. Compelling Reasons Do Not Exist on the Fifth Amendment Issue	11
	B. Compelling Reasons Do Not Exist on the Fourteenth Amendment Issue	24
	C. Compelling Reasons Do Not Exist on the Legal Standard Used for Interference with Familial Relations	25
IV.	CONCLUSION	25

TABLE OF AUTHORITIES

Page

CASES

Blyew v. United States, 13 Wall. 581, 20 L.Ed. 638 (1872) 19

Buckley v. Fitzsimmons, 509 U.S. 259 (1993) 21

Burrell v. Virginia, 396 F.3d 508 (4th Cir. 2005) 11, 13, 14, 15

Chavez v. Martinez, 583 U.S. 760 (2003) ..... *passim*

Counselman v. Hitchcock, 142 U.S. 547 (1892) 20, 26

Higazy v. Templeton, 505 F.3d 161 (2nd Cir. 2007) 11, 18, 19, 21

In re Gault, 387 U.S. 1 (1967) 24

Kastigar v. United States, 406 U.S. 441 (1972) 20

Murray v. Earle, 405 F.3d 278 (5th Cir. 2005) 11, 16, 17, 18

People v. Chi Ko Wong, 18 Cal. 3d 698 (1976) 23

People v. Superior Court (1973 Grand Jury), 13 Cal.3d 430 (1975) 22

Renda v. King, 347 F.3d 550 (3rd Cir. 2003) 11, 12, 13

Sornberger v. City of Knoxville, 434 F.3d 1006 (7th Cir. 2006) 11, 15, 18, 19, 21

Stoot v. City of Everett, 582 F.3d 910 (9th Cir. 2009), cert. denied in *Jensen v. Stoot*, 130 S.Ct. 2343, 176 L.Ed.2d 577, 78 USLW 3375, 78 USLW 3576, 78 USLW 3580 (U.S. Apr. 05, 2010) (No. 09-728) 11, 18, 19, 21, 23

Weaver v. Brenner, 40 F.3d 527 (2nd Cir. 1994) 18

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION AND STATUTES

Fifth Amendment 20

Fourteenth Amendment 5, 24, 25, 26

42 U.S.C. § 1983 ..... 12, 16

Supreme Court Rule 10 9

California Penal Code § 888 22

California Penal Code § 911 22

California Penal Code § 914(a) 22

Cal. Welf. & Inst. Code § 631 10

Cal. Welf. & Inst. Code § 707 8

OTHER SOURCES

Black's Law Dictionary, Fifth Edition 21

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The Judiciary Act of 1789, 1 Stat. 73, Chap. XX, Section 33 ..... 20, 26

Witkin, 4 *California Criminal Law* (3d), p. 46, § 31 22

I.

INTRODUCTION

In 1998, fourteen-year-old Michael Crowe was coerced by members of the Escondido Police Department[1] into confessing to the murder of his twelve-year-old sister, Stephanie. In fact, Michael was innocent. Pet. App. 9 and 33. The interrogations spanned four days, during which Michael was completely isolated from his parents because, without reasonable cause, police claimed they believed Michael and his sister Shannon were in danger of immediate physical abuse. Pet. App. 190. Michael was vulnerable. He loved Stephanie (20JER4899[2]) and had seen his sister, blood soaked, dead. 20JER4831.

When Michael begged the police to let him see his family, they falsely told him his family hated him because they had seen all the evidence showing he killed Stephanie, never wanted to see him again, and that they were the only friends he had. 43JER10363 ¶ 26.

The last two interrogations were videotaped. The tapes provide an irrefutable record of the psychological torture Michael endured at the hands of his tormentors. The interrogation of Michael Crowe

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[1] The City of Escondido is thirty miles north-east of San Diego, California.

[2] "JER" references are to the volume and page of the Joint Excerpted Record that was before the Ninth Circuit in deciding this case.

received world-wide attention. Amnesty International featured it in a cover story of *Amnesty Now* on coerced confessions. 43JER10551. It received national attention. It was the subject of a full length television movie (*The Interrogation of Michael Crowe*) and an hour long story on the CBS News program *48 Hours*. 43JER10551.

The videotapes and transcripts of Michael's interrogations were part of the record on appeal. The record was reviewed *de novo* by the Ninth Circuit. Testimony of experts and non-experts was also part of the record. An expert in coerced confessions testified the interrogation was the "most psychologically brutal interrogation and tortured confession that I have ever observed." The Director of Child Psychiatry Residence Training Program at U.C.S.D. characterized it as "the most extreme form of emotional child abuse that I have ever observed in my nearly forty years of observing and working with children and adolescents." A former Justice on a California Court of Appeal with extensive prosecutorial experience testified Michael's statements were the product of a "coercive police scheme." A juror in the real killer's trial described Michael's interrogation as "brutal and inhumane" and "psychological torture." Pet. App. 46-47.

The Ninth Circuit said the tapes showed Michael was cajoled, threatened, lied to, and relentlessly pressured by teams of police officers, and concluded: "'Psychological torture' is not an inapt description." Pet. App. 47.

The "coercive police scheme" will be briefly summarized. The Lieutenant (Bass) and Sergeant (Anderson) in charge of the investigation assembled a team. Dr. Lawrence Blum,[3] a psychologist, was hired to come up with an overall plan and teach the interrogators. *See* generally, Pet. App. 66. Lead Detective Ralph Claytor and Detective Mark Wrisley played the roles of bad cop (Claytor) and good cop (Wrisley). Oceanside Police detective Chris McDonough was brought in from a neighboring agency to administer the CVSA (Computerized Voice Stress Analyzer), a so-called lie detection machine.

Lt. Bass and Sgt. Anderson (40JER9687, 34:27-35:16) decided to use CVSA (40JER9687, 34:27-35:1; 35:15-16) even though the Department had never used it before in a criminal case (40JER9687, 34:23-26). The polygraph was standard procedure for new police hires (40JER9701, 106:6-12) and criminal suspects (40JER9686, 30:16-20). The Escondido Police Department had three polygraphers (39JER9523), two already assigned to the Crowe case (Bass [39JER9524]; Martin [40JER9686, 32:3-8]). Anderson requested the CVSA, but could not remember why (40JER9701, 107:24-108:1). Even though he had never seen it used and did not know if it detected truth or deception (40JER9701, 107:6-16), he contacted Oceanside Police detective and CVSA operator Chris McDonough

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[3] During the pendency of the Petitions for Writ of Certiorari, Dr. Blum settled with the Crowe plaintiffs.

(40JER9702, 109:7-15), but did not remember if he asked him if the CVSA was reliable (40JER9702, 109:21-110:2). Anderson did not even remember if he *cared* if it was reliable. 40JER9702, 110:4-5.

Claytor and Wrisley at times worked together, at others, alone. Team members monitored proceedings on closed circuit television in another room. Claytor and Wrisley falsely told Michael they had irrefutable physical evidence of his guilt. Among other things, they told him his hair was found in Stephanie's hand (21JER4968), her blood was found in his room (21JER5018), her blood had been washed down the bathroom sink (21JER4979), and all the doors and windows were locked. 21JER4960. They told him, "So, it's either Shannon, or it's your grandma, or it's your mom, or it's your dad, or it's you." 21JER5117.

McDonough presented himself as an outside, objective party brought in to verify Michael's story (20JER4864) by a machine so accurate it was "spy stuff . . . controlled by the government for a long time." 20JER4865. McDonough's representations were false. 41JER9901-02. Since 1966, Department of Defense and other studies available in the public domain showed the CVSA did not work. 41JER9902.[4]

McDonough told Michael his subconscious mind might be blocking what he did, which explained why

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[4] During the pendency of this case, the manufacturer of the CVSA settled with the Crowes.

he could not remember committing the murder. After McDonough exited, Claytor and Wrisley appeared, emphasizing the irrefutable physical evidence proving Michael's guilt. McDonough's blocking suggestion and Claytor and Wrisley's irrefutable proof caused Michael to doubt his own memory. He was told there were two Michael's, a good Michael and a bad Michael. Pet. App. 21. Michael was told they wanted to bring out the bad Michael so they could "help" by getting the bad Michael treatment. Pet. App. 32. Michael was repeatedly told he wasn't a bad person and they wanted to help him. Pet. App. 16.

Michael was told there were two paths, one leading to prison and punishment, the other to treatment and rehabilitation. 21JER5140. If Michael wanted to take the right path he had to show he was sorry by confessing. 21JER5140.

Prodded by questions, Michael described his sister in tender terms ("she loved God," 21JER5083) and then was told to write a letter of apology to her for murdering her. 17JER4011-212.

The letter writing ploy failed because it did not provide details about how the murder was committed. Michael said he wanted to take the right path but since he did not know what happened, he would have to lie. "Let's try that" Claytor responded. 37JER8988. Michael warned what he was going to say would be a complete lie. Claytor replied: "Tell us the story." 37JER9008.

What Michael did not know was the police had a motive to make the murder an inside job. It is undisputed that Stephanie was stabbed to death in her bedroom between 10 and 11 p.m. on January 20, 1998. In the preceding three hours, residents in the immediate vicinity (a remote, rural area) of the Crowe house reported a prowler on both sides of the street. Police were dispatched twice in response to 911 calls. Officer Scott Walters responded to a 911 call made at 9:28 p.m. (39JER9430) by the Crowe's neighbor, Reverend West. West waited for the police to arrive, but no one did. 29JER6917. Shortly before 9:56 (*Crowe* at 417), Walters was on the Crowe end of a common driveway West shared with the Crowe house. Walters squad car was lit up: alley lights, high beams, spotlight, take-down lights (9JER2030-2031). Walter saw a door almost completely open (29JER6933), a light was on inside (29JER6934), but no one standing at the door (29JER6934). Then, according to Walters, the door closed "normally." 29JER6935.

Seeing nothing "unusual" (39JER9464, 49:23), Walters reported the prowler "gone on arrival" (39JER9464, 50:2-5), took himself out of service and headed to town for dinner. 29JER6937. Within the

hour, perhaps within moments, Stephanie Crowe was stabbed to death.[5]

Excessive and unwarranted police behavior was not confined to Michael. Family members were taken to the station and told they had to strip and be photographed. Father Stephen was photographed front, back and side completely nude, mother Cheryl without her underwear, and ten-year old Shannon wearing only panties. Pet. App. 12.

After taking Michael and Shannon from them, Stephen and Cheryl were told they were free to leave. When they tried to, police confronted them at the front door, shouting for them to get back inside. Detective Wrisley did so while pointing a gun at them. Pet. App. 65.

The effect of what the Ninth Circuit said could be aptly described as psychological torture is plainly visible on the videotape. Michael cries out, writhes, contorts, weeps, and expresses pain. When Claytor asked what the greatest fear he can imagine was, Michael replied: "I'm afraid there is someone else inside of me." 37JER8919.

Michael's confession was used before the grand jury, which indicted him for murder. The transcript of this proceeding was entitled *The People of the State of*

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[5] "It is undisputed Stephanie died between 10 and 11 pm." (303 F.Supp.2d 1050 at 1058). Walters was eating at Spires Restaurant from 10:10 to 10:42. (29JER6937).

California v. Michael Stephan Crowe and bears criminal case number SCD 130983. 42JER10266. Michael's confession was also used at a 707 hearing[6] in order to convince a Superior Court judge that he should be tried as an adult.

Shortly before trial, an independent forensic laboratory examined the shirt of Richard Tuite, the prowler whom neighbors reported seeing in the Crowes' neighborhood the night of the murder. His shirt had been collected as part of the initial investigation, but never fully tested. Pet. App. 9. Blood was found and positively identified as Stephanie's by DNA. Pet. App. 9.

The criminal case was dismissed without prejudice. The Escondido Police Department continued its investigation, but on February 5, 2000, San Diego County Sheriffs Homicide took over. After a two year investigation, Tuite was arrested (May 26th, 2004) for Stephanie's murder. The California Attorney General prosecuted the case after the San Diego County District Attorney stepped aside. Tuite was found guilty of voluntary manslaughter by a jury on May 26, 2004 and sentenced to thirteen years in prison. His earliest parole date is February 23, 2017.

Six years elapsed from the date the civil complaint was filed by the Crowes until the District

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[6] A 707 Hearing is held to determine whether a minor should be tried in juvenile or adult court. *See Cal. Welf. & Inst. Code* § 707.

Court issued its ruling on qualified immunity adverse to the Crowes. Another five years elapsed from the time the Crowes were allowed to file a notice of appeal with the Ninth Circuit, until the Ninth Circuit issued its opinion. Eleven years after filing the complaint, this case has not moved beyond the qualified immunity stage.

The purpose of qualified immunity is the speedy resolution of suits against government officials for the alleged violation of constitutional rights. Its goal is to assure that government officials are free to go about their duties without being hindered by the time, worry, and expense of defending lawsuits.

Twelve years after Stephanie's murder, and eleven years after seeking redress under § 1983 in federal court, the issue of qualified immunity has not yet been finally resolved. At the rate this case is going, Tuite may be out of jail before this case is concluded.

II.

ISSUES PRESENTED

Three Petitions have been filed: (1) Escondido (Claytor, et al.), (2) Oceanside (McDonough) and (3) Blum. The Crowes do not respond to the Blum Petition because he settled with the Crowes while his Petition was pending. The Escondido and Oceanside Petitions essentially raise three issues:

1. Whether compelling reasons (required by Supreme Court Rule 10) have been shown to grant a

Petition where Petitioners claim it was not clearly established in December of 1999 that it was a violation of the Fifth Amendment to coerce a confession from an innocent fourteen-year-old boy and use it against him during different phases of his criminal case, including before a grand jury to obtain an indictment for murder, before a court to persuade it to order him to be tried as an adult, and by placing information in the court file showing he had confessed, which court file judges making determinations about bail were required to consult.[7]

2. Whether compelling reasons have been shown to grant a Petition where Petitioners claim it was not clearly established in December of 1999 that it was a violation of the Fourteenth Amendment to psychologically torture an innocent fourteen-year-old boy into falsely confessing to the murder of his sister.

3. Whether compelling reasons have been shown to grant a Petition where Petitioner's claim the test for interference with the Fourteenth Amendments right to be free from governmental interference with a familial relationship is that it must "shock the conscience" rather than constitute "unwarranted interference."

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[7] California law requires that a minor be released within forty-eight hours of arrest unless a petition is filed explaining why he should be declared a ward of the court. *See Cal. Welf. & Inst. Code* § 631. The petition filed with the court said Michael admitted killing his sister. 42JER10089.

III.

ARGUMENT

A. Compelling Reasons Do Not Exist on the Fifth Amendment Issue

Petitioners claim the Supreme Court's ruling in *Chavez v. Martinez* 583 U.S. 760 (2003) created confusion about whether the Fifth Amendment's implicit "use" requirement was satisfied only when introduced against the suspect at his trial or whether "criminal case" included pre-trial judicial proceedings.

Six cases are cited as evidence of a conflict. On the one hand, Petitioners assert, the Second (*Higazy*),[8] Seventh (*Sornberger*),[9] and Ninth (*Stoot*)[10] Circuits have held use at trial is *not* required, merely use in judicial pre-trial proceedings, while the Third (*Renda*),[11] Fourth (*Burrell*),[12] and Fifth (*Murray*) Circuits[13] hold use at trial *is* required. Petition, pps. 12-13.

Renda, *Burrell* and *Murray* do not show a conflict in the Circuits because none decide whether "use" in a "criminal case" is required. The only issue decided

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[8] *Higazy v. Templeton*, 505 F.3d 161 (2nd Cir. 2007).

[9] *Sornberger v. City of Knoxville*, 434 F.3d 1006 (7th Cir. 2006).

[10] *Stoot v. City of Everett*, 582 F.3d 910 (9th Cir. 2009).

[11] *Renda v. King*, 347 F.3d 550 (3rd Cir. 2003).

[12] *Burrell v. Virginia*, 396 F.3d 508 (4th Cir. 2005).

[13] *Murray v. Earle*, 405 F.3d 278 (5th Cir. 2005).

in *Renda* was whether the mere failure to give a *Miranda* warning would support a later civil rights claim under § 1983. *Renda* holds it would not. Everything said about "use" and "criminal case" in *Renda* is *dicta*.

Renda lived with her boyfriend, Sonafelt, a state trooper. They had an argument, she left. The police were called, two state troopers investigated. Renda told them Sonafelt hit her but she did not want to press charges.

Sonafelt was questioned and denied Renda's accusation. Renda was questioned again and asked to write a statement. She did, but it did not mention the battery. The state troopers later claimed when they asked about this, she admitted lying to them earlier.[14] Renda was charged with making a false statement to the police. The trial court suppressed her statement because she was not given her *Miranda* rights. The criminal case against Renda was dismissed.

Renda filed a § 1983 action. Although her original complaint alleged violations of the First, Fourth, Fifth and Fourteenth Amendments, the only claim which survived[15] sought to impose liability for failure

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[14] Renda denied this. She said she told the two state troopers she left it out of her statement because she did not want Sonafelt charged.

[15] "During the trial, the District Court dismissed the coerced interrogation claim." *Renda, supra* at 553.

to give her a *Miranda* warning.[16] The Third Circuit held the mere failure to give a *Miranda* warning would not support a cause of action under § 1983. *Renda*'s language about the use of a statement at "trial" (*see Renda* at 558, 559) is *dicta*.

The fact *Renda* was *charged* is beside the point. The issue actually decided was that a mere failure to provide a *Miranda* warning would not support a § 1983 claim. In light of the Supreme Court's later decision in *Chavez*, so holding (*Chavez* at 761), there is little chance of a conflict arising on this issue.

The only issue decided by *Burrell* was whether the issuance of summons by a police officer in the field to a motorist involved in an accident ordering him to appear in traffic court violated the Fifth Amendment. *Burrell* held it did not. *Burrell* does not involve a coerced confession. In fact, it involves the opposite – silence. Burrell refused a police officer's request to produce proof of insurance (required under state law of a motorist involved in an accident) on the ground he had a Fifth Amendment right not to incriminate himself.

The police officer served Burrell with two summonses: (1) operating an uninsured motor vehicle without paying an uninsured motorist fee, and (2) obstruction of justice. A Virginia traffic court convicted

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[16] " . . . Renda claims . . . defendants violated . . . her right under *Miranda* to be free from custodial interrogation." *Renda, supra* at 557.

Burrell of obstructing justice, but dismissed the charge of failure to maintain insurance. The charge of obstructing justice was dismissed on appeal.

Several key facts in *Burrell* are unclear. The opinion says it is not clear from the record whether Burrell's assertion of his Fifth Amendment right was used against him in traffic court. It is hard to see how Burrell could have been convicted of obstruction of justice without evidence at trial that he exercised his Fifth Amendment right to remain silent.

Burrell does not decide whether Burrell had a Fifth Amendment right to refuse the police officer's request. It does not discuss whether evidence of Burrell's exercise of his right to remain silent at trial would violate his Fifth Amendment right not to be compelled to be a witness against himself in any criminal case. It does not explain whether a traffic court has jurisdiction over crimes or only infractions, and if the offenses Burrell was charged with were infractions, whether trial on an infraction was a "criminal case."

Burrell's fact pattern presents these interesting issues, none of which were resolved. The reason: the issue decided by the Fourth Circuit was extremely narrow. Footnote 4 says:

> Unlike in *Chavez*, criminal charges *were* ultimately brought against Burrell. The record does not disclose whether the prosecution attempted to introduce evidence of Burrell's failure to respond at the trial for obstruction

> of justice or whether such evidence was in fact admitted. At oral argument, Burrell's counsel affirmed in response to the court's question that Burrell *only* claims that his constitutional rights were violated at the time the summonses were issued, not at the time of trial. *Burrell* at 513, n.4.

Hence, everything which occurred after the issuance of the summonses was irrelevant because Burrell's counsel told the Court his sole claim was that Burrell's constitutional rights had been violated at the time the summonses were issued. The only issue *Burrell* decided was that mere issuance of a summons – in effect, the equivalent of a traffic ticket – following an exercise of the right to remain silent, did not compel a person to be a witness against himself in any criminal case. Everything *Burrell* says about "trial" and "courtroom use" is *dicta*.

Significantly, *Sornberger v. City of Knoxville*, 484 F.3d 1006 (7th Cir. 2006), holding a violation of the Fifth Amendment occurred when a coerced statement was used at a probable cause hearing, bail hearing and an arraignment (*id.* at 1027), denied that its decision was in conflict with *Burrell*:

> We do not see any conflict between our holding today and that of our sister circuit in *Burrell*. There, Burrell claimed that his constitutional rights were violated when the police issued him an obstruction of justice summons for invoking his right to remain silent. The Fourth Circuit held that the issuance of a summons was not a "*courtroom use*

> of a criminal defendant's compelled, self-incriminating testimony," and therefore Burrell failed to state a claim under § 1983 for violation of his right against self-incrimination. Here, by contrast, Teresa's confession was used at a preliminary hearing to find probable cause to indict, to arraign and to set her bail. *Id.* at 1027.

Murray did involve the "use" of a confession "at trial," but its holding rested entirely on the issue of causation. *Murray* held the erroneous admission of a confession by the trial court was a superseding cause which broke the chain of causation required to impose civil liability in a later civil rights action under § 1983.

Eleven-year-old LaCresha Murray lived with her grandparents, R.L. and Shirley Murray, who also provided daycare at their home. Two-year-old Jayla was routinely cared for by the Murrays. LaCresha told R.L. that Jayla was throwing up. At around 5:00 p.m. Jayla was sweating profusely. She was pronounced dead at a hospital at about 5:30 p.m. The medical examiner concluded Jayla sustained severe liver injury as a result of a blunt force blow causing four ribs to break which split Jayla's liver in two, resulting in Jayla's death within five to fifteen minutes.

Three days later, LaCresha was in the Texas Baptist Children's Home when detectives questioned her. They did not take her to a magistrate, as required by Texas law, before questioning her because

of advice from a prosecutor that LaCresha was not in custody. However, they gave LaCresha a *Miranda* warning, then interrogated her for two hours. LaCresha admitted dropping Jayla and kicking her. She was charged with capital murder and injury to a child.

The juvenile court ruled her confession admissible, the jury convicted her of negligent homicide and injury to a child. Extensive publicity followed. The juvenile court, perhaps influenced by publicity, ordered a new trial on its own motion. LaCresha was charged with injury to a child, her confession was again admitted, and a second jury convicted her. The juvenile court adjudicated her delinquent and sentenced her to twenty-five years.

The Texas Court of Appeals reversed, holding LaCresha had been in state custody and should have been taken before a magistrate before being questioned and that her confession was inadmissible.

The Fifth Circuit held the admission (though erroneous) of LaCresha's confession was an independent, superseding cause of the violation of her Fifth Amendment rights (*id.* at 290) and "[i]n this circuit, it was not well-established at the time of LaCresha's interrogation that an official's pre-trial interrogation of a suspect could subsequently expose that official to liability for violation of a suspect's Fifth Amendment rights at trial." *Id.* at 293.

In contrast, this principle *was* well established in the Ninth Circuit (Pet. App. 44). This distinguishes

Crowe from *Murray*. *Murray* was decided solely on the issue of causation. The Court found the chain of causation was broken when a trial court erroneously admitted the defendant's statements. Whether this reasoning is correct is debatable,[17] but this is beside the point, because Murray's statements were erroneously admitted by the trial court. Crowe's coerced statements were suppressed by the state criminal court. Pet. App. 31-32. *Murray* sheds no light on, and provides no precedent for, the question of whether use of LaCresha's confession in pre-trial judicial proceedings would have constituted "use" in a "criminal case." Everything *Murray* says about "trial," "at trial," "trial right" (*see Murray* at 285) "criminal case," and "at trial" is *dicta*.

In contrast *Sornberger*, *Higazy* and *Stoot*, all decided later, squarely decide the issue of "use" in any "criminal case." *Higazy* (use at a bail hearing), *Sornberger* (use to initiate criminal proceedings), *Stoot* (use to initiate criminal proceedings) and other cases[18] remain faithful to the pluralities' statement in

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[17] At common law, the future (1) event and (2) injury must both be unforeseeable to constitute a superseding cause. There are many reported cases where trial courts have erroneously admitted confessions and been reversed on appeal. Hence, at the time a suspect is being questioned it is foreseeable that his statement will be used against him, or excluded by the trial court, or erroneously admitted by the trial court.

[18] Like *Weaver v. Brenner*, 40 F.3d 527 (2nd Cir. 1994), holding use of a coerced confession before a grand jury violates the Fifth Amendment. *Id.* at 536.

Chavez that "criminal case" is a general term for "an action, cause, suit, or controversy at law . . . a question contested before a court of justice." *Chavez* at 766 citing *Blyew v. United States*, 13 Wall. 581, 595, 20 L.Ed. 638 (1872).

Sornberger, *Higazy* and *Stoot* all follow the Fifth Amendment's text and the Supreme Court's guidance in *Chavez* requiring "use" in a "criminal case." They are consistent with the historical meaning of "criminal case" at the time the Fifth Amendment was ratified. Sir James Stephen's *A History of the Criminal Law of England* shows "criminal case" referred to the entire criminal judicial process: "These are the indictment or information, the arraignment of the prisoner, and his trial down to the verdict and judgment." Stephen, *A History of the Criminal Law of England* at 273. Sir Stephen explains the "indictment is the foundation of the record in all criminal cases, and is indeed the only document connected with the trial which in all cases is in writing." *Id.* at 274. "It is enough to say that in all common cases the pleadings in a criminal trial have always consisted, and still consist, of an indictment engrossed on parchment, and a plea given of the accused person orally in open court, of guilty or not guilty." *Id.* at 275.

England's Bill of Rights (1689) shows bail was part of a criminal case: "And excessive bail hath been required of persons committed in criminal cases to elude the benefit of the laws made for the liberty of the subjects. *English Bill of Rights*, 1689. The Judiciary Act of 1789 also shows bail was considered part of

a criminal case: "And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death . . . " *The Judiciary Act of 1789*, 1 Stat. 73, Chap. XX, Section 33.[19]

Hence, "criminal case," at the time the Fifth Amendment was ratified, referred to the entire criminal judicial process up to and including sentencing, including proceedings before a grand jury. *Counselman v. Hitchcock*, 142 U.S. 547 (1892), unanimously held proceedings before a grand jury were part of a "criminal case." It has never been overruled.[20]

When a crime is committed, there is an "investigatory" and "judicial" phase. The investigatory phase involves gathering evidence, finding witnesses, and questioning suspects. The judicial phase involves presenting evidence to a grand jury, obtaining an indictment, bringing the defendant before the court, setting bail, hearing and deciding motions, trial, sentencing and appeal. When a grand jury or juvenile court receives evidence, the line has been crossed

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[19] The Fifth Amendment was ratified in 1791, two years after the Judiciary Act.

[20] Westlaw incorrectly says *Counselman* was "overruled in part" by *Kastigar v. United States*, 406 U.S. 441 (1972). Westlaw confuses what a case *holds* with what it says. *Kastigar* explains: "Our holding is consistent with the conceptual basis of *Counselman*. *Id.* at 444. Elsewhere, *Kastigar* merely says the "broad language" of *Counselman*, implying an immunity statute must afford *greater* protection than the Fifth Amendment is *dicta*. *Id.* at 444-445.

from the "investigatory" phase and has moved into the "judicial" phase. The contours of this line have been elucidated in a different but analogous context in cases like *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) and its progeny.

The holding in *Sornberger*, *Higazy*, *Stoot*, and *Crowe* are consistent with the historical meaning of "criminal case," the unanimous holding of the Supreme Court in *Counselman*, and the guidance provided by *Chavez*. *Chavez* explained that "criminal case" at the very least required initiation of legal proceedings (*id.* at 766), and was a "general term for an action, cause, suit or controversy at law" (*id.* at 766).

To the extent *Chavez* and other Supreme Court decisions use the word "trial" in connection with the Fifth Amendment's "use" requirement, it is submitted that, like "criminal case," it is being used in a general sense to refer to judicial proceedings over which a trial court has jurisdiction. *Black's Law Dictionary* defines the "trial court" as "[t]he court of original jurisdiction; the first to consider litigation. Used in contrast to appellate courts." *Black's Law Dictionary*, Fifth Edition. In California, the court exercising original jurisdiction over Michael's criminal case was the Superior Court. It was empowered to, and exercised authority over, every phase of Michael's criminal case, from grand jury, indictment, arraignment, bail, determining whether he should be tried as an adult, as well as hearing and ruling on pre-trial motions.

A grand jury is a competent tribunal (*California Penal Code* § 888) authorized by the law of the land (*id.*) to hear evidence and bring indictments (Witkin, 4 *California Criminal Law* (3d), p. 46, § 31). Grand jurors must possess specified qualifications (*id.* p. 47, § 32), are required to take an oath (*California Penal Code* § 911) and are "charged by the court" (*California Penal Code* § 914(a)) concerning their responsibilities.

The California Supreme Court has held "there is no doubt that a grand jury is part of the court by which it is convened, and that is under the control of the court . . . " *People v. Superior Court (1973 Grand Jury)*, 13 Cal.3d 430 at 438 (1975). *California Penal Code* § 888 makes clear that a grand jury acts under the authority of the judicial branch: "A grand jury is a body of the required number of persons returned from the citizens of the county before a court of competent jurisdiction, and sworn to inquire of public offenses committed or triable within the county."

Witnesses in Michael's criminal case, bearing case number SCD 130983 (42JER10266), testified before the grand jury, which indicted him for murder. Proceedings before the grand jury were part of Michael's "criminal case" because the grand jury acted pursuant to judicial authority and was subject to judicial oversight, and the subject matter was "an action, cause, suit or controversy at law" (*Chavez* at 766).

A Superior Court judge presided over Michael's 707 hearing, the purpose of which was to decide

whether Michael should be tried as an adult. A 707 hearing is a critical phase in a criminal case. *People v. Chi Ko Wong*, 18 Cal. 3d 698, 718 (1976) held it must comport with due process:

> " . . . [T]he certification of a juvenile offender to an adult court has been accurately characterized as 'the worst punishment the juvenile system is empowered to inflict.'" (*Id.* at 810).

The Ninth Circuit's *Crowe* decision is correct. Michael's confession was used against him in a criminal case. The Ninth Circuit cited its decision in *Stoot v. City of Everett*[21] (holding when a confession was used to file criminal charges in juvenile court it constituted use in a criminal proceeding, *Stoot* at 912) to support its decision in *Crowe*. Before *Crowe* was decided by the Ninth Circuit, but after a Petition for Certiorari had been filed with the Supreme Court in *Stoot*, Escondido filed an *amicus* brief in *Stoot* (2010 WL 304259) essentially arguing the same thing it does in the instant Petition. The Supreme Court denied certiorari in *Stoot*.[22] It should deny it here as well.

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[21] *Stoot v. City of Everett*, 582 F.3d 910 (9th Cir. 2009), cert. denied in *Jensen v. Stoot*, 130 S.Ct. 2343, 176 L.Ed.2d 577, 78 USLW 3375, 78 USLW 3576, 78 USLW 3580 (U.S. Apr. 05, 2010) (No. 09-728).

[22] *Id.*

B. Compelling Reasons Do Not Exist on the Fourteenth Amendment Issue

Petitioners claim what the police did to Michael does not shock the conscience. The videotape of his interrogation refutes this. Petitioners create the erroneous impression the District Court was in a better position to decide the Fourteenth Amendment issue than the Ninth Circuit because the District Court judge reviewed all the videotapes and transcripts of the interrogations. This ignores the fact the Ninth Circuit's review was *de novo* and it also reviewed them.

> "One need only read the transcripts of the boys' interrogations, or watch the videotapes, to understand how thoroughly the defendants' conduct in this case 'shocks the conscience' . . . 'Psychological torture' is not an inapt description." (Pet. App. 47).

The Ninth Circuit faithfully followed the Supreme Court's guidance (for example, citing *In re Gault*, 387 U.S. 1 (1967)) in finding Michael's interrogation shocked the conscience in violation of the Fourteenth Amendment.

In addition to the videotapes of the interrogations, the Ninth Circuit also had before it the testimony of lay and expert witnesses who described the interrogation as "psychologically brutal," "tortured," "extreme . . . emotional child abuse" the product of a "coercive police scheme," "brutal," "inhumane," and "psychological torture."

The Ninth Circuit's decision was unanimous, one of the panel members had extensive experience as a prosecutor,[23] and a motion for re-hearing was denied *en banc*. The Ninth Circuit followed the proper legal standard in finding Michael's interrogation violated the Fourteenth Amendment.

C. Compelling Reasons Do Not Exist on the Legal Standard Used for Interference with Familial Relations

The Ninth Circuit used the correct legal standard ("unwarranted interference" Pet. App. 70) for interference with family relations and the Petition does not show compelling reasons to grant certiorari to decide this question.

IV.

CONCLUSION

Eleven years after the Crowes filed their § 1983 civil rights action, the issue of qualified immunity has not yet been finally resolved because Petitioners are asking the Supreme Court to grant Certiorari from the decision of the Ninth Circuit. In this time span,

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[23] As Chief of the Los Angeles County District Attorney's Office, United States Attorney for the Central District of California, Assistant Attorney General in the Criminal Division of the U.S. Department of Justice, and Associate Attorney General. *Federal Judicial Center*, Trott, Stephen S.

the trial judge, a plaintiff (Mrs. Kennedy), and a plaintiff's expert witness (Justice Puglia) have died.

The Crowes recognize that government officials, discharging their duties in good faith, should not have to be constantly looking over their shoulders or distracted by time consuming, expensive, and emotionally draining litigation.

However, the Crowes urge that the maxim "Justice delayed is justice denied" should be more than a platitude. The time, expense, and emotional toll of litigation affects them as well. While they recognize qualified immunity serves an important societal purpose, they contend some consideration should be given to them.

More than a decade has passed since the Crowes filed their case. The record before the Ninth Circuit was extensive, carefully considered, and thoroughly reviewed. The Ninth Circuit's decision faithfully followed Supreme Court precedent. There is no conflict in the Circuits on the issues decided in *Crowe*; in fact, there is uniformity in the Circuits on those issues. *Crowe* adheres to the historical meaning of "criminal case" and Supreme Court precedent, like *Counselman*. It is consistent with the historical understanding of "criminal case" reflected in England's Bill of Rights (1689) and the Judiciary Act of 1789. The record provided ample evidence for the Ninth Circuit to hold that the interrogation of Michael Crowe shocked the conscience in violation of the Fourteenth Amendment.

Petitioners have had ample opportunity to make their case for qualified immunity. The time has come to allow the Crowes to make their case on the merits to a jury.

Respectfully submitted,

MILTON J. SILVERMAN, ESQ.
Counsel of Record
LAW OFFICE OF MILTON J. SILVERMAN
2404 Broadway
San Diego, CA 92102
Telephone: (619) 231-6611
Facsimile: (619) 231-6692
E-Mail: silvermanatlaw@aol.com

Counsel for Respondents
Michael Crowe, Stephen Crowe,
Cheryl Crow, Shannon Crowe,
and Judith Ann Kennedy

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In The
Supreme Court of the United States

MARK WRISLEY, *et al.*,

Petitioners,

v.

MICHAEL CROWE, *et al.*,

Respondents.

CHRISTOPHER McDONOUGH,

Petitioner,

v.

MICHAEL CROWE, *et al.*,

Respondents.

LAWRENCE N. BLUM,

Petitioner,

v.

MICHAEL CROWE, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CONSOLIDATED BRIEF IN OPPOSITION OF AARON HOUSER, MARGARET SUSAN HOUSER, AND GREGG HOUSER

BOUDREAU WILLIAMS LLP
JON R. WILLIAMS, ESQ.
Counsel of Record
666 State Street
San Diego, CA 92101
(619) 238-0370 (phone)
(619) 238-8181 (facsimile)
williams@bwlawllp.com

SCHOVILLE & ARNELL, LLP
DENNIS A. SCHOVILLE, ESQ.
LOUIS G. ARNELL, ESQ.
2404 Broadway
San Diego, CA 92101
(619) 232-9901 (phone)
(619) 232-9904 (facsimile)

Attorneys for Respondents
Aaron Houser, Margaret Susan Houser, and Gregg Houser

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Whether Petitioners have presented compelling reasons to grant the petitions, where the Ninth Circuit Court of Appeals correctly held on the record before it that:

1. Use of confessions coerced from juveniles and later introduced in pre-trial proceedings during the course of the "criminal case" violate the Fifth Amendment right against self-incrimination;

2. A police conspiracy to intentionally violate a juvenile's Constitutional rights, with the aim of coercing a confession no matter the human toll, sufficiently "shocks the conscience" to support a violation of the Fourteenth Amendment's due process protections;

3. A clinical psychologist, retained by police to devise strategies and techniques to "psychologically break" juvenile criminal suspects during coercive interrogations, may be held liable for conspiracy to violate those juveniles' constitutional rights.

TABLE OF CONTENTS

		Page
QUESTIONS PRESENTED		i
TABLE OF CONTENTS		ii
TABLE OF AUTHORITIES		v
I.	INTRODUCTION	1
II.	STATEMENT OF THE CASE	2
	A. Summary	7
	B. January 22, 1998: The Police Interrogate Aaron Houser at His Home	8
	C. January 27, 1998: The Police Interrogate Aaron Houser Again at His Home and at the Escondido Police Department	8
	D. January 27, 1998 to January 28, 1998: The Police Interrogate Joshua Treadway For 13 Hours Overnight	9
	E. The Ruse Phone Call to Aaron	10
	F. February 10, 1998: The Police Interrogate Joshua For Another 12 Hours	11
	G. February 11, 1998: The Police Arrest Aaron at School, Search His Locker and Home, and Interrogate Him For a Third Time	12
	H. Use of the Boys' Statements in the Criminal Cases Against Them	14
	I. Dismissals of Indictments and Prosecution of Tuite	15

TABLE OF CONTENTS – Continued

Page

J. The Boys' Subsequent § 1983 Action in the District Court 15

K. The Ninth Circuit's Ruling..... 16

III. REASONS FOR DENYING THE PETITIONS 18

A. Petitioners' Attempts to Manufacture Review of Respondents' Fifth Amendment Claims Has Recently Been Rejected by This Court and Should Be Rejected Again Now 18

1. The Alleged Split Between the Circuit Courts Does Not Warrant This Court's Attention at This Time..... 20

a. The Third Circuit 20

b. The Fourth Circuit 22

c. The Fifth Circuit..... 25

d. The Sixth Circuit..... 26

2. The Compelling Facts of This Case Make It a Uniquely Poor Vehicle for Review of the Widespread Application of Fifth Amendment Protections 27

3. Petitioners' Claim That the Ninth Circuit's Decision Will Have a "Chilling Effect" on Law Enforcement Activities Is Supported Neither By Fact Nor Law 29

TABLE OF CONTENTS – Continued

Page

B. Petitioners' Arguments That There Is a Need to Clarify "Conscience Shocking" Behavior Under the Fourteenth Amendment Also Fails to Raise an Issue Worthy of This Court's Review 32

1. This Court's Decisions Are Replete with Examples of Verbally Coercive Interrogations Which Violate the Fourteenth Amendment..... 32

2. Petitioners' Companion "Shocks the Conscience" Arguments Warrant Even Less Scrutiny by This Court 36

C. The Ninth Circuit's Reversal of Summary Judgment on the Conspiracy Claim Asserted Against Blum Was Entirely Fact-Driven and Therefore Presents No Legal Issue for This Court to Clarify..... 38

IV. CONCLUSION..... 41

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Fulminante, 499 U.S. 279 (1991) 36

Blackburn v. Alabama, 361 U.S. 199 (1960) 36

Buckley v. Fitzsimmons, 509 U.S. 259 (1993).....31

Burrell v. Virginia, 395 F.3d 508 (4th Cir. 2005) 22, 23, 24, 25, 26

Chavez v. Martinez, 538 U.S. 760 (2003).....*passim*

Clement v. City of Glendale, 518 F.3d 1090 (9th Cir. 2008) 39

Cooper v. Dupnick, 963 F.2d 1220 (9th Cir. 1992) 30

Dickerson v. United States, 530 U.S. 428 (2000) 21

Franklin v. Fox, 312 F.3d 423 (9th Cir. 2002).....39

Gallegos v. Colorado, 370 U.S. 49 (1962).....33, 34, 35

Giuffre v. Bissell, 31 F.3d 1241 (3rd Cir. 1994).....21

Haley v. State of Ohio, 332 U.S. 596 (1948).....2, 32, 35

Higazy v. Templeton, 505 F.3d 161 (2nd Cir. 2007) 27

In re: Dennis H., 19 Cal.App.3d 350 (1971).....14

In re: Gault, 387 U.S. 1 (1967) 2, 19, 28, 34, 35

Kastigar v. United States, 406 U.S. 441 (1972) 19

Marcus W. v. Superior Court, 98 Cal.App.4th 36 (2002).....15

McKinley v. City of Mansfield, 404 F.3d 418 (6th Cir. 2005) 26, 31

TABLE OF AUTHORITIES – Continued

Page

Murray v. Earle, 405 F.3d 278 (5th Cir. 2005).....25, 26

People v. Burton, 6 Cal.3d 375 (1971).....13

Ramona R. v. Superior Court, 37 Cal.3d 802 (1985).....14

Reck v. Pate, 367 U.S. 433 (1961).....36

Renda v. King, 347 F.3d 550 (3rd Cir. 2003).....20, 21, 22

Richardson v. McKnight, 521 U.S. 399 (1997) 38, 39

Sornberger v. City of Knoxville, Ill., 434 F.3d 1006 (7th Cir. 2006) 21, 23, 24, 27

Stoot v. City of Everett, 582 F.3d 910 (9th Cir. 2009) 19, 22, 27, 28

Taylor v. Maddox, 366 F.3d 992 (9th Cir. 2004) 35

Woods v. Clusen, 794 F.2d 293 (7th Cir. 1986).....35

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. V .....*passim*

42 U.S.C. § 1983 .....*passim*

Cal. Welf. & Inst. Code § 631 14

OTHER

87 A.L.R.2d 624, *Voluntariness and Admissibility of Minor's Confessions* 35

TABLE OF AUTHORITIES – Continued

Page

82 N.C.L. Rev. 891,
The Problem of False Confessions in the Post-DNA World 35

30 N.Y.U. Rev.L. & Soc. Change 209,
The Reality of False Confessions – Lessons of the Central Park Jogger Case 35

I. INTRODUCTION

There is a climactic scene in the beloved movie classic, *The Wizard of Oz*, where Dorothy and her cohorts return to the Emerald City for an audience with a powerful Wizard who has promised to deliver Dorothy to Kansas, a brain to the Scarecrow, a heart to the Tin Woodsman, and bravery to the Cowardly Lion. When they finally come face to face with the Mighty Oz, the apparition blusters, telling them not to invoke his wrath and to go away. Just then however, Dorothy's dog Toto pulls aside a curtain, revealing nothing more than a slight man operating levers that have only created the illusion of the Wizard. In that unguarded moment, the Mighty Oz admonishes them to "pay no attention to the man behind the curtain," but is ultimately forced to admit that he is little more than a balloonist from Kansas.

Like the Mighty Oz, Petitioners have attempted in their respective petitions to mystify this Court with the look and feel of great erudition, while concealing the humble reality that those petitions present nothing that has not already been decided by this Court and uniformly followed by the Circuit Courts of Appeal. Petitioners also urge this Court to pay no attention to what lies behind their curtain of rhetoric and hyperbole, but Respondents pull it back here to: (A) clarify that no conflict exists among the Circuit Courts which have actually decided the issue confronted by the Ninth Circuit here – the use of coerced confessions in pre-trial proceedings within the "criminal case" after charges have been filed;

(B) illuminate how psychological torture, leveled against 14- and 15-year-old boys, has long been regarded as the basis for a Fourteenth Amendment due process violation; and (C) explain how uniform authority holds that private actors who assist in violating the constitutional rights of others may be held liable for conspiracy. In doing so, Respondents remind this Court of its own relevant decisions and the consistent decisions of the Circuit Courts, all of which demonstrate why review is not warranted here. Accordingly, Respondents urge this Court to deny review in this case where, like that balloonist from Kansas, Petitioners' respective petitions are viewed by this Court for what they really are, and not what Petitioners have projected them to be.

II. STATEMENT OF THE CASE

For well over a half century – and in two seminal decisions, *Haley v. State of Ohio,* 332 U.S. 596 (1948) and *In re: Gault,* 387 U.S. 1 (1967) – this Court has recognized that juveniles subjected to the strain of custodial police interrogations are "easy victims of the law" and as such, "cannot be judged by the more exacting standards of maturity." It has done so reasoning "that which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." And it is for that very reason that this Court recognized why "authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children."

Consequently, this Court has mandated that the police must exercise "the greatest care" in their interrogations of juveniles – not only to assure that any admissions are not coerced – but also to guarantee that they are "not the product of ignorance of rights, or of adolescent fantasy, fright or despair." Similarly, it has instructed reviewing courts to take "special care" in scrutinizing the record where a juvenile's confession is at issue, especially where the totality of circumstances suggest that the minor is "no match for the police in such a contest."

This case poignantly illustrates the reasons for the Court's concern. Indeed, this case is the tragic tale of the police investigation of the murder of 11-year-old Stephanie Crowe, who was viciously stabbed to death in her bedroom by Richard Tuite, a schizophrenic transient with a history of drug use and violent crime. Within a few short hours leading up to that murder, Tuite had been menacing an otherwise quiet neighborhood in rural Escondido, California, in his search for "Tracy," an old girlfriend. His activities understandably prompted several 911 calls to local police officials from anxious neighbors complaining about Tuite's bizarre behavior and attempts to enter their homes looking for "Tracy."

When those police officials finally responded in the late evening hours, they knew Tuite was last seen banging on the door of a home adjacent to where Stephanie Crowe lived. Approaching that location with all lights on his patrol car ablaze, the lone police officer sent to the scene saw a side door to Stephanie's

house inexplicably close as he approached. But without investigating further, that officer turned around, concluded that Tuite was simply "gone on arrival," and then took himself out of service so he could eat dinner.

Having so easily evaded that police officer, Tuite made his way through Stephanie's house and into her bedroom, finally finding someone he believed resembled "Tracy." Tuite then fatally stabbed Stephanie in her bedroom, where she was found slain by her horrified family.

Called to investigate in the morning, the police instantly seized upon a flawed theory that this hideous crime had been committed by a member of Stephanie's family, and not by Tuite. Using a ploy to separate Stephanie's brother and sister from their parents, the police instantly began hammering on Stephanie's 14-year-old brother, Michael Crowe, as their lead suspect. In brazen violation of Michael's rights, the police subjected Michael to prolonged, coerced interrogations, deliberately disregarding his repeated requests to see his parents, to stop the interrogations, and to use the bathroom or to sleep. Enlisting the aid of a clinical psychologist and a "truth box" voice analyzing machine which they knew was merely a sham instrument meant to intimidate and "psychologically break" Michael, the police ultimately wore Michael down, convincing him that he had some sort of pent-up hate of Stephanie that caused him to "black out" and kill her without realizing it.

Yet even after coercing that confession, the police still had a problem. While the evidence continued to point strongly to Tuite as Stephanie's murderer, no physical evidence linked Michael to the crime. Ignoring Tuite, the police cast a dragnet over two of Michael's friends, Joshua Treadway and Aaron Houser (also juveniles), accusing them of being accomplices and co-conspirators. In what one expert would later characterize as "the most extreme form of emotional child abuse that I have ever observed in my nearly 40 years of observing and working with children and adolescents," the police employed the same coercive interrogation techniques to Joshua and Aaron, not to learn or discover the truth, but to browbeat, deceive, threaten and – by any means necessary – coerce them into admitting to their preconceived and factually unsupported theory of how Stephanie was murdered, no matter how strongly the actual evidence pointed toward Tuite.

However, when blood evidence from Tuite's clothing (ignored by the police for a year) was later confirmed to be Stephanie's, charges against Michael, Joshua and Aaron were reluctantly dropped, and Tuite was prosecuted for, and ultimately convicted of, Stephanie's murder. Consequently, Michael, Joshua and Aaron filed suit against the police and related entities, alleging that their civil rights had been repeatedly and intentionally violated by the police to support a ridiculous "theory-based" investigation, and in a concerted effort to provide "cover" for one of their

own who had the last, best chance to stop Tuite, but never even attempted to do so.

While the District Court granted the police summary judgment by measuring their behavior as if they had been dealing with hardened adult criminal suspects, the Ninth Circuit reversed, finding on *de novo* review that "[o]ne need only read the transcripts of the boys' interrogations, or watch the videotapes, to understand how thoroughly the defendants' conduct in this case 'shocks the conscience.'" (App. 47.)[1] The Ninth Circuit further held that use of those coerced confessions at various pre-trial hearings – but after charges had been brought against the boys and the "criminal case" commenced – violated their Fifth Amendment right against self-incrimination. (App. 36-45.)

In an attempt to induce this Court's review, Petitioners have offered a highly glossed and sanitized version of the underlying facts. *But it is the unique and compelling facts of this case which make it a particularly unsuitable vehicle for review on the multiple issues raised by Petitioners.* Thus, as Rule 15.2 requires Respondents to point out to the Court any perceived misstatements of fact contained in the underlying petitions, Respondents focus here on the

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[1] All factual references in this Opposition Brief are made to the Appendix of documents attached to the Petition of Mark Wrisley, Barry Sweeney, Ralph Claytor, and Phillip Anderson ("the Escondido Petitioners"), and are abbreviated as: "(App. [page].)"

insufficiencies in that recitation, citing to the underlying opinions of the Ninth Circuit and the District Court.

A. Summary.

In his separate Opposition Brief, Co-Respondent, Michael Crowe, describes in detail the facts leading up to Tuite's murder of Stephanie, how the circumstantial and physical evidence strongly implicated Tuite from the outset of the investigation, and how no physical evidence whatsoever tied Michael to the murder of his sister. Thus, for the sake of brevity, a full recounting of those facts and circumstances will not be repeated here.

Suffice it to say, however, that within minutes of arriving at the scene, the Escondido police officers investigating Stephanie's murder conspired to pin that hideous crime on a family member, and Michael unfortunately became their target. The problem with that plan was that notwithstanding their ability to "psychologically break" Michael and to coerce a confession from him, *the police could find no physical evidence (including a murder weapon) linking Michael to that crime*. Thus, to justify their own mistreatment of Michael, the investigating officers further conspired to search, arrest and interrogate two of Michael's friends, Joshua Treadway and Aaron Houser, all with the goal of further knuckling under those juveniles to support their "theory-based"

investigation, even as the objective evidence increasingly pointed to Tuite.

B. January 22, 1998: The Police Interrogate Aaron Houser at His Home.

On January 22, 1998, Petitioners first interrogated Aaron at his residence. (App. 25.) They initially questioned Aaron regarding his relationship with Michael, and his interest in mystical fantasy games and medieval weapons. (*Id.*) Although those questions were clearly intended to elicit incriminating responses from Aaron, the police never warned Aaron (then a 14-year-old with no prior criminal record) of his *Miranda* rights. (*Id.*)

C. January 27, 1998: The Police Interrogate Aaron Houser Again at His Home and at the Escondido Police Department.

On January 27, 1998, Petitioners executed a search warrant at Aaron's residence, based primarily on prior statements they elicited from him. (App. 25.) During that search, Aaron was confined to his living room and kitchen, except when brought to his bedroom to answer questions. Aaron was then taken to the Escondido police station for further questioning, which lasted nearly two hours. (*Id.*) Again, those interrogations were clearly intended to elicit incriminating responses and were even videotaped for that

purpose, but at no time was Aaron advised of his Fifth Amendment rights. (*Id.*)

D. January 27, 1998 to January 28, 1998: The Police Interrogate Joshua Treadway For 13 Hours Overnight.

At approximately 7:00 p.m. on January 27, 1998, the Escondido Police began their first grueling interrogation of Joshua, lasting over 13 hours. (App. 29-30.) To begin, Claytor questioned Joshua for several hours, employing various techniques outlined for him by psychologist, Lawrence Blum, meant to coerce Joshua into admitting involvement in a crime that neither he, nor his friends, committed. (*Id.*) Specifically, Claytor baited Joshua with promises of leniency (rehabilitation) and then scared him with threats of punishment (prison). (*Id.*) He also denied Joshua's request to see his mother, denied his request for water, and refused to take him to the bathroom. (*Id.*) Claytor never advised Joshua of his Fifth Amendment rights. (*Id.*)

As Joshua began to show visible signs of strain following Claytor's, Wrisley's and Sweeney's seven hours of grilling, McDonough strategically took over Joshua's interrogation at 3:00 a.m. on January 28, 1998, consistent with the plan the officers and Blum had previously devised to "break" Joshua. (*Id.*) It was at this time that McDonough turned loose on Joshua the "truth box" Computer Voice Stress Analyzer ("CVSA") device. (*Id.*) Notably, McDonough would

later admit he did not know how or if the CVSA worked, but told Joshua in no uncertain terms that the CVSA was "97% accurate," and immediately determines if your answer is right or wrong.

Despite McDonough's onslaught and deception, Joshua initially maintained his innocence. (App. 30.) However, McDonough relentlessly interrogated and psychologically abused Joshua, utilizing the CVSA as the tool of that coercion. Joshua was exhausted and repeatedly asked to be allowed to sleep. (*Id.*) When Joshua ultimately broke down and falsely told McDonough that Aaron gave him the knife used to kill Stephanie – *the only story Joshua discerned would allow him to escape further coercion* – McDonough pretended to administer another CVSA exam, telling Joshua that he had now "passed" the test. (*Id.*) Yet at no time during over 13 hours of interrogation did McDonough "*Mirandize*" Joshua Treadway. (*Id.*)

E. The Ruse Phone Call to Aaron.

Having "cracked" 15-year-old Joshua, Claytor and Anderson further manipulated Joshua in an unconscionable attempt to obtain a false confession from Aaron. Specifically, they goaded Joshua to call Aaron and to accuse him of complicity in Stephanie's murder while they secretly listened to that phone call. (App. 30.) Aaron, however, denied any involvement, and was emotionally shocked, confused and frightened by that ruse. (*Id.*)

F. February 10, 1998: The Police Interrogate Joshua For Another 12 Hours.

Having already succeeded in extracting a false story from Joshua that Aaron gave him the knife Michael used to kill Stephanie, McDonough, Claytor and other officers pushed their plan further, deciding to bring Joshua back for another interrogation on February 10, 1998. (App. 30.)

Knowing that Joshua was already vulnerable to their influence and that they could now manipulate Joshua to follow their preconceived script, McDonough and Claytor interrogated Joshua for another 12 hours. (*Id.*) With direction and assistance from Blum, Claytor and McDonough used similar coercive techniques to those utilized on January 28, 1998, with similar results. By the end of that interrogation session, they had Joshua fabricate a fantasy confession in which Aaron stabbed Stephanie with Michael Crowe's help, while he (Joshua) acted as the "lookout." (*Id.*)

Notably, that false confession was so meandering and internally inconsistent – with key facts changing every few moments – that even McDonough doubted it to be true. (*Id.*) Yet this did not deter the officers from arresting Joshua at the conclusion of this second interrogation, *reading him his Miranda rights for the first time*, and booking him into San Diego County Juvenile Hall. (*Id.*)

G. February 11, 1998: The Police Arrest Aaron at School, Search His Locker and Home, and Interrogate Him For a Third Time.

Using Joshua's false confession of February 10, 1998, as "probable cause," the following day the police searched Aaron's home and his school locker, while they seized Aaron at his school without telling him he was under arrest. (App. 25.)

After Aaron was brought from school to the Escondido Police Department, he was interrogated for a total of nine and one-half hours, primarily by McDonough. (*Id.*) As with Michael and Joshua, McDonough's interrogation of Aaron was psychologically grueling, was based on coercive techniques and strategies tailored by Blum to overtake Aaron's will and to force a false confession, and was justified by Blum telling the officers that Aaron was "a Charles Manson wannabe" and "Charles Manson with an I.Q." (App. 26, 77.) Aaron was also interrogated under false pretenses in that neither he nor his parents were told that Joshua had implicated him in the murder, or that Aaron was even a suspect. (App. 26-28.) As such, Aaron was under the false impression that he was merely assisting the police in their investigation of Michael. (*Id.*)

As with Joshua, McDonough repeatedly deceived Aaron in his attempts to extract a confession. For example, during the interrogation, McDonough asked Aaron to describe "hypothetically" how Michael might

kill Stephanie, how Joshua might, and how Aaron might do so. (*Id.*) To accomplish that goal, McDonough used the CVSA device to "condition" and "suggest" Aaron's responses. (*Id.*) But not only was Aaron's hypothetical description at odds with the evidence of how the killing actually took place, it was completely different from Joshua's fabricated scenario, which also did not match the evidence. Nevertheless, McDonough told Aaron that the CVSA indicated that he was "definitely involved" and that Petitioners had physical evidence against him and would soon uncover more. (*Id.*) McDonough continued that deception by also telling Aaron that Michael and Joshua had said that Aaron helped him kill Stephanie, and that the physical evidence would implicate him. (*Id.*)

Upon realizing for the first time that he had been deceived and was being questioned as a suspect, Aaron demanded that the interrogation stop and asked to use the bathroom. Neither request was honored. (*Id.*) On two additional occasions, Aaron asked to speak with his mother, but was not permitted to do so.[2] (*Id.*) Claytor also denied Aaron the right to speak with his father. (*Id.*) On another occasion, Aaron demanded that the interrogation cease which

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[2] Under California law, a minor subject to custodial interrogation invokes his Fifth Amendment right by asking to see a parent. *People v. Burton*, 6 Cal.3d 375, 383-384 (1971). Upon such a request, before or during questioning, "the police must cease custodial interrogation immediately." *Id.* at 384.

request was likewise denied. (*Id.*) Yet after approximately 11 hours of coercive interrogation in which Aaron maintained his innocence, the police booked him into Juvenile Hall, never having properly advised him of his *Miranda* rights. He was thereafter handcuffed, photographed in the nude, and incarcerated for approximately *eight months*.

H. Use of the Boys' Statements in the Criminal Cases Against Them.

Statements obtained from the boys during their interrogations were introduced during at least three pre-trial proceedings. (App. 30-31.) First, a "*Dennis H.*" hearing was held and resulted in Aaron and Joshua spending several months in jail awaiting trial.[3] Second, the boys' statements were introduced during subsequent grand jury proceedings, resulting in indictments against all three boys for murder. Finally, the statements were used in a "707 Hearing" to determine if the boys would be tried as juveniles or adults.[4] (*Id.*)

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[3] In California, when a minor is taken into custody by a police officer, he must be released within 48 hours from the time of apprehension unless a petition is filed within that time in a court of competent jurisdiction explaining why the minor should be declared a ward of the court. See Cal. Welf. & Inst. Code § 631; see also *In re: Dennis H.*, 19 Cal.App.3d 350, 354 (1971).

[4] The California Supreme Court has characterized trying a minor as an adult as "the worst punishment the juvenile system is empowered to inflict." *Ramona R. v. Superior Court*, 37 Cal.3d

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Notably, at a subsequent suppression hearing, the state court found that most of Michael's statements were the product of a "coercive scheme" by the police and suppressed them. Similarly, the state court suppressed all of Aaron's statements on the grounds that Aaron had never been *Mirandized*, while also suppressing a large portion of Joshua's statements on the same basis. (App. 31-32.)

I. Dismissals of Indictments and Prosecution of Tuite.

After the case against the boys had been set for trial, pieces of Tuite's clothes (which had been collected but never analyzed when the police first stopped Tuite the day after Stephanie was killed) were examined, the DNA results of which revealed spots of Stephanie's blood. (App. 32-33.) The prosecution then filed a Motion to Dismiss the indictment against the boys. (*Id.*)

J. The Boys' Subsequent § 1983 Action in the District Court.

After the charges against them were dismissed, the boys and their families filed three separate complaints in state court alleging violations of 42 U.S.C.

802, 810 (1985); accord *Marcus W. v. Superior Court*, 98 Cal.App.4th 36, 45 (2002) (holding that the privilege against self-incrimination applies in "707 hearings").

§ 1983 and various state law torts. Petitioners removed the complaints to federal court. (App. 33-36.)

Following various motions to dismiss those complaints, the District Court consolidated all three actions and ordered the filing of a Joint First Amended Complaint. (*Id.*) Petitioners then brought over 10 separate motions for summary judgment, which were the subject of substantial, serial briefing in the District Court over a period of four and one-half years. (*Id.*) Prior to Tuite's trial and ultimate conviction for Stephanie's murder, the District Court issued the first of two lengthy opinions on February 17, 2004, finding in substance that Joshua's and Aaron's respective claims for violation of their Fourth, Fifth and Fourteenth Amendment rights did not survive summary judgment. (App. 197-356.)

After Tuite's conviction, the District Court on February 28, 2005 ruled on Michael's and his family's remaining civil rights claims, prompted by a second round of similar motions for summary judgment filed by Petitioners. Following the course it charted with the claims brought by Joshua and Aaron, the District Court also denied Michael any relief on his Fourth, Fifth, and Fourteenth Amendment claims. (App. 90-196.)

K. The Ninth Circuit's Ruling.

Upon *de novo* review, the Ninth Circuit reversed in part and affirmed in part the District Court's two rulings. Specifically, consistent with this Court's

plurality opinion in *Chavez v. Martinez*, 538 U.S. 760 (2003) – which found a violation of the right against self-incrimination occurs if one has been compelled to be a witness against himself in "any criminal case" – the Ninth Circuit held that all three pre-trial proceedings in which Michael's and Aaron's statements were used were part of the "criminal case" against them and supported a Fifth Amendment cause of action. (App. 36-45.)

The Ninth Circuit similarly reversed the District Court, holding instead that the Petitioners' brutal and coercive conduct – meant to overcome the will of adolescent boys – amounted to "psychological torture" and sufficiently "shocked the conscience" to support a Fourteenth Amendment Due Process claim. (App. 45-48.)

Furthermore, the Ninth Circuit reinstated other claims asserted against McDonough and Blum; the Crowes' deprivation of familial relationship claim based upon Michael's incarceration; and the Housers' deprivation of familial relationship claims based upon Aaron's incarceration. (App. 66-71.)

The Ninth Circuit, however, affirmed summary judgment as to all of Michael's and Aaron's Fourth Amendment violations (related to the existence of probable cause for their arrests and the searches of their homes); the Fourth Amendment conspiracy claim against McDonough; Michael's and Aaron's defamation claims against Prosecutor Stephan; Aaron's defamation claim against Blum; and all

claims against the municipal entity defendants. (App. 48-59, 68, 71-80.)

Finally, the Ninth Circuit affirmed the District Court's denial of summary judgment as to the Crowes' individual claims for Fourth Amendment violations arising out of their respective strip searches and drawing of blood samples; as well as their claims for wrongful detention and deprivation of familial companionship arising out of Michael and his sister, Shannon, being placed in protective custody. (App. 62-66.)

Petitioners thereafter petitioned the Ninth Circuit for rehearing and rehearing *en banc*, both of which were properly denied. (App. 6.)

III. REASONS FOR DENYING THE PETITIONS

A. Petitioners' Attempts to Manufacture Review of Respondents' Fifth Amendment Claims Has Recently Been Rejected by This Court and Should Be Rejected Again Now.

The Fifth Amendment provides that no person "shall be compelled *in any criminal case* to be a witness against himself." U.S. Const. amend. V (emph. added). This Court has emphasized that the "sole concern" of the Fifth Amendment is "to afford protection against being 'forced to give testimony leading to the infliction of penalties affixed to . . .

criminal acts.'" *Kastigar v. United States*, 406 U.S. 441, 444 (1972).

Petitioners claim that in the wake of the *Chavez* plurality opinion, there is an alleged "conflict" within the Circuit Courts about when, precisely, a "criminal case" begins. As Respondents here explain, that argument is nothing new, but rather is precisely the same argument the Escondido Petitioners raised as amicus in support of review of the Ninth Circuit's prior decision in *Stoot v. City of Everett,* 582 F.3d 910 (9th Cir. 2009), *cert. denied*, April 5, 2010. This Court rejected those same arguments *just over seven months ago*, and should do so again now.

Moreover, as Respondents further explain, this case presents a uniquely poor vehicle for review of the widespread application of Fifth Amendment protections, as it involves juvenile criminal defendants who this Court has mandated should be subject to different interrogation standards (*i.e.,* "the greatest care" standard under *In re: Gault,* 387 U.S. at 55) than their fully emancipated adult counterparts. Accordingly, as that "greatest care" standard necessarily overlays the Ninth Circuit's Fifth Amendment analysis, this case is an inappropriate platform from which to extrapolate legal concepts meant to apply to a much broader population of criminal defendants.

1. The Alleged Split Between the Circuit Courts Does Not Warrant This Court's Attention at This Time.

With great hyperbole, Petitioners claim that a "deep circuit split" exists by relying on decisions from four Circuits – the Third, Fourth, Fifth, and Sixth Circuits. They do so by cherry-picking language from a small collection of cases in those Circuits which have never squarely addressed the "criminal case" question post-*Chavez*, as have the Second, Seventh, and Ninth Circuits. As set forth more fully below, the language on which Petitioners rely either pre-dates *Chavez*, or is *dicta* (not binding on future decisions in those Circuits) wrested from factually distinguishable decisions. Consequently, it remains unclear whether those Circuits would hold differently if they were actually confronted with the same compelling factual scenario presented in this case.

a. The Third Circuit.

For example, in the Third Circuit decision of *Renda v. King*, 347 F.3d 550, 553 (3rd Cir. 2003), the plaintiff was charged with giving false reports to law enforcement authorities. The Court of Common Pleas suppressed the plaintiff's statements due to *Miranda* violations and the case was *nolle prossed* by the District Attorney for lack of evidence. *Id.* The plaintiff filed an action pursuant to 42 U.S.C. § 1983 alleging, among other things, a violation of her Fifth Amendment rights. The Third Circuit held that the plaintiff's Fifth Amendment rights were not violated

because her statements were never used against her at trial. *Id.* at 559. In doing so, however, the Third Circuit failed to engage in any substantive analysis of the issue now presented to the Court. The decision simply states on this issue: " . . . our prior decision in *Giuffre* compels the conclusion that it is the use of coerced statements during a criminal trial, and not in obtaining an indictment, that violates the Constitution." *Id.*

Notably, however, *Giuffre v. Bissell,* 31 F.3d 1241 (3rd Cir. 1994), upon which *Renda* relied, was a pre-*Chavez* case. Additionally, as correctly pointed out by the Seventh Circuit in the subsequent, post-*Chavez* decision of *Sornberger v. City of Knoxville, Ill.,* 434 F.3d 1006 (7th Cir. 2006), *Giuffre* was "decided before the Supreme Court determined in *Dickerson v. United States,* 530 U.S. 428 (2000), that the *Miranda* warnings themselves have constitutional status." *Id.* at 1025. The Seventh Circuit concluded therefore that "little weight" should be placed on the holding in *Giuffre,* given that subsequent change in the law. *Id.* Furthermore, *Giuffre* was factually similar to *Chavez* in that officers obtained a statement from the plaintiff during an allegedly coerced interrogation but charges were later dropped prior to the filing of a criminal case. *Id.* at 1244. Here, in contrast, Aaron's coerced statements were used in bringing criminal charges against him, in denying his pre-trial release, and in deciding whether to try him as an adult.

In short, the *Renda* decision relied entirely on a distinguishable pre-*Chavez* decision which failed to

set forth any detailed analysis to support its conclusion that a Fifth Amendment violation occurs only when a statement has been used at *trial*. As such, *Renda* does not present a proverbial "split" among the Circuits at all, let alone one that is sufficiently mature to warrant this Court's attention now. Indeed, faced with facts similar to those presented in this case – and given the guidance this Court has provided since in *Chavez* – it cannot be said with any degree of certainty that the Third Circuit would not agree with the Ninth Circuit's decisions in both *Stoot* and this case.

b. The Fourth Circuit.

Similarly, in the Fourth Circuit decision of *Burrell v. Virginia,* 395 F.3d 508, 510 (4th Cir. 2005), an officer approached the plaintiff at a traffic accident scene. When the plaintiff refused to answer any of the officer's questions, he was charged with obstruction of justice and operating an uninsured motor vehicle. *Id.* at 511. When the plaintiff's conviction on those charges was later overturned on appeal, he brought a § 1983 action alleging, among other things, his Fifth Amendment rights were violated by the state compelling him to produce evidence of insurance. *Id.*

The Fourth Circuit analyzed the plaintiff's claim under *Chavez* noting that this Court's plurality conclusion that a violation of the constitutional right of self-incrimination occurs *only* if one has been compelled to be a witness against himself in a criminal

case. *Id.* at 513, citing *Chavez,* 538 U.S. at 770. The *Burrell* court then focused on Justices Souter's and Breyer's concurrence in *Chavez* which concentrated on whether a violation required "*courtroom use* of a criminal defendant's compelled, self-incriminating testimony. . . ." *Id.,* citing *Chavez,* 538 U.S. at 777 (emph. in orig.). Based on that reasoning alone, *Burrell* concluded "[Plaintiff] does not allege any *trial* action that violated his Fifth Amendment rights: thus, *ipso facto,* his claim fails on the plurality's reasoning." *Id.* But closer scrutiny reveals that *Burrell's* statement regarding requirement of a "trial" action is pure *dicta.* Indeed, the plaintiff in *Burrell* never alleged any "courtroom use" of statements since he only asserted a violation occurred at the time summonses were issued by the state. *Id.* Thus, that language, as it related to the question presented by the limited facts of that particular case, went well beyond those facts and consequently, would not be binding on subsequent cases.

In fact, the Seventh Circuit in *Sornberger,* which reached the same conclusion as the Ninth Circuit in this case, explained why that isolated language in *Burrell* created no conflict with its own holding:

> We do not see conflict between our holding today and that of our sister circuit in *Burrell.* There, Burrell claimed that his constitutional rights were violated when the police issued him an obstruction of justice summons for invoking his right to remain silent. The Fourth Circuit held that the issuance of

> a summons was not a "*courtroom use* of a criminal defendant's compelled, self-incriminating testimony," and therefore Burrell failed to state a claim under § 1983 for violation of his right against self-incrimination. Here, by contrast, Teresa's confession was used at a preliminary hearing to find probable cause to indict, to arraign and to set her bail. More than the mere issuance of a summons, failure to administer Teresa *Miranda* warnings led to three distinct "courtroom uses" of her unwarned statements.

Sornberger, 434 F.3d at 1027.

Consequently, it is entirely unclear whether the Fourth Circuit would hold differently given the facts of this case. Indeed, like the situation in *Sornberger* and unlike the situation in *Burrell,* the coerced statements used against Aaron formed the basis for filing formal charges against him, were used to determine his pre-trial custody status, and led to Aaron being tried as an adult, all "courtroom uses." As such, the "courtroom use" of the statement that was entirely lacking in *Burrell* is fully present in this case, as it was in *Sornberger*. Accordingly, the Fourth Circuit's decision in *Burrell* does not present a split among the Circuits, but must be viewed as limited to the facts before it, which are clearly distinguishable from those found in this case.

c. The Fifth Circuit.

In the Fifth Circuit's decision of *Murray v. Earle*, 405 F.3d 278 (5th Cir. 2005), the plaintiff (a juvenile) was charged with capital murder and injury to a child. The plaintiff's statements, obtained without taking her before a magistrate or notifying her parents or an attorney as required by Texas law, were used against her during two different trials leading to her conviction. *Id.* at 284. The Texas Court of Appeals, however, reversed those convictions due to improperly acquired statements. *Id.* The plaintiff subsequently brought a § 1983 action alleging, among other things, a violation of her Fifth Amendment rights. *Id.*

When the plaintiff challenged the trial court's grant of qualified immunity, the Fifth Circuit stated: "The Fifth Amendment privilege against self-incrimination is a fundamental trial right which can be violated only at trial, even though pre-trial conduct by law enforcement officials may ultimately impair that right." *Id.* at 285. The *Murray* court, however, provided no analysis regarding the question presented in this case, or clarified by the *Chavez* plurality: *pre-trial use of coerced statements within the criminal case*. Indeed, as in *Burrell,* that statement was circumscribed by the facts before it, as the plaintiff's confession in *Murray* had, in fact, been used *two different times* against her at trial. *Id.* at 284. Thus, *Murray* cannot be reasonably construed as going beyond its limited facts to reach a scenario where, like here, those same self-incriminating

statements are used in various pre-trial proceedings which implicate substantial liberty interests. Indeed, if confronted with the significantly distinguishable facts present in this case, it is unclear whether the Fifth Circuit would hold any different than the Ninth Circuit did in this case, or be bound by the factually dissimilar situation presented in *Murray*.

d. The Sixth Circuit.

Finally, in *McKinley v. City of Mansfield,* 404 F.3d 418, 425 (6th Cir. 2005), the self-incriminating statements in question were introduced at trial and played a "central role" in the plaintiff's conviction. Consequently, the *McKinley* court's recitation of the rule (in a mere footnote, no less) that the Fifth Amendment is a "trial protection" right was appropriate on the limited facts before it. But it does nothing to require a similar holding where another court in the Sixth Circuit is later confronted with the facts present in this case: pre-trial use of a self-incriminating statement within the confines of the criminal case.

Again, like the decision of the Fourth Circuit in *Burrell,* and the Fifth Circuit in *Murray,* the Sixth Circuit's mere recitation in *McKinley* of a "trial protection" rule – without any further analysis – does not define the contours of the Fifth Amendment in that Circuit, but must instead be viewed within the limited facts presented to the *McKinley* court. Indeed, none of the decisions on which Petitioners rely have

squarely addressed the different factual situation present here, and none would prohibit another court from ruling exactly as the Ninth Circuit did in this case if they are confronted with those distinguishable facts in the future.

In contrast, every Circuit which has squarely addressed pre-trial use of self-incriminating statements in the "criminal case" has uniformly followed this Court's guidance in *Chavez* and found such use to violate the Fifth Amendment. See, *e.g.*, *Sornberger,* 434 F.3d at 1026; *Higazy v. Templeton,* 505 F.3d 161, 172 (2nd Cir. 2007); *Stoot,* 582 F.3d at 925-926. There is no reason to believe the results would be any different if (and when) the Third, Fourth, Fifth and Sixth Circuits have the opportunity to confront that same issue. But until they do – and render a decision on similar facts which is actually at odds with the decisions of the Second, Seventh, and Ninth Circuits – any alleged "conflict" raised by the Petitioners is simply non-existent, let alone sufficiently mature at this juncture to warrant this Court's attention.

2. The Compelling Facts of This Case Make It a Uniquely Poor Vehicle for Review of the Widespread Application of Fifth Amendment Protections.

As mentioned at the outset of this brief, one of the most compelling aspects of this case is that it involves juveniles (boys, ages 14 and 15) – with no

prior criminal history or contact with the police – who were subjected to hours of coercive interrogation *before* they were ever apprised of their *Miranda* rights. While Petitioners pay lip service to this fact, they just as quickly go on *to forget* Respondents' relative youth, condoning inquisitorial techniques and practices which have been found to be appropriate, if at all, for adult criminal suspects.

But the standards for exercising the "greatest care" in analyzing police interrogations of juveniles are well-established, and run directly contrary to the authority relied upon by Petitioners. Indeed, as this Court made clear over a half-century ago in *In re: Gault*:

> We appreciate that *special problems* may arise with respect to waiver of the [Fifth Amendment] privilege by or on behalf of children, and that there may well be some differences in technique – but not in principle – depending upon the age of the child and the presence and competence of parents . . . , the *greatest care* must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.

In re: Gault, 387 U.S. at 55 (emph. added).

There can be no doubt that those "special problems" – as well as the established body of law from this Court and others which deal specifically with the

care which must be afforded juvenile criminal defendants in custodial interrogations – properly influenced the Ninth Circuit's analysis of Aaron's Fifth Amendment claims, and would do the same if this Court were to review this case. Consequently, the "special problems" inherent in addressing a juvenile case, and the unique and compelling factual issues involved in this case, make it an inappropriate vehicle for resolving the questions presented.

3. Petitioners' Claim That the Ninth Circuit's Decision Will Have a "Chilling Effect" on Law Enforcement Activities Is Supported Neither By Fact Nor Law.

In a reprise of the unsuccessful arguments they offered in the *Stoot* case, Petitioners again argue the Ninth Circuit's decision in this case will have a "chilling effect" on law enforcement activities. Specifically, Petitioners suggest that the Ninth Circuit's opinion creates an unworkable standard that will expose law enforcement officers to unnecessary lawsuits and civil liability, blithely characterizing this case as involving "garden variety" interrogation techniques, even where juveniles were involved.

Those arguments, however, presuppose that law enforcement officers do not have to follow rules applicable to interrogations and that if they do not, there will be no repercussions. To the contrary, this Court's precedent, beginning with *Miranda* and

continuing to the present day, sets forth clear requirements for a proper interrogation. A law enforcement officer must follow those rules or face the consequences.

Here, the record aptly demonstrates how time and again, Petitioners deliberately flouted those rules by interrogating Michael and Aaron for hours, and only *Mirandizing* them at the end of those interrogations *after* they had overcome the boys' will and secured the confessions they were seeking. Consequently, Petitioners' arguments about the need for "proper guidelines" rings hollow when the record shows how *they deliberately violated the guidelines this Court has already provided in myriad cases.* Moreover, at the time Petitioners took that action, it was firmly established in the Ninth Circuit that the defense of qualified immunity is not available to police officers who knowingly violate the law. *Cooper v. Dupnick,* 963 F.2d 1220, 1251 (9th Cir. 1992), overruled on other grounds in *Chavez,* 538 U.S. 760. Rather than justifying protection for the proper exercise of their duties, when law enforcement officials act as they have in this case, "they invite redress under section 1983." *Id.* at 1252.

Petitioners' fall-back position – that the police cannot, as a matter of law, be found liable for any Fifth Amendment violation where prosecutors (and not they) introduce those coerced statements at trial – merits even less consideration. Such an argument lacks *any* legal support, and, in fact, has been squarely rejected by the very authority cited by

Petitioners. See *McKinley,* 404 F.3d at 436-437, fn. 23 (addressing the District Court's decision in this case and finding its reasoning wholly "unpersuasive"). *McKinley* then cited a long train of authority – including *Chavez* – where it has never been questioned that the police may be held liable under § 1983 for violating someone's Fifth Amendment rights. *Id.*

Indeed, as both the Sixth Circuit in *McKinley* and the Ninth Circuit in this case properly concluded, a rule barring suits against the police for Fifth Amendment violations *is a rule barring any suits for Fifth Amendment violations*, given that prosecutors are *absolutely immune* from suit for their conduct as advocates within the judicial process. *Id.* at 437-438, citing *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993).

But it cannot be – and in fact, has never been – that invasions of the right against compelled self-incrimination are not actionable. Consequently, Petitioners' assertions to the contrary should be rejected by this Court on that basis alone. (App. 42-44.)

In sum, as freedom from compulsion lies at the heart of the Fifth Amendment, no purpose would be advanced by making the police immune, as a matter of law, from the protections that Amendment provides. Indeed, if this were the case, the police would only be *encouraged* to compel coerced and self-incriminating statements with complete impunity. Surely, such a result would be wholly contrary to a

long train of well-settled authority meant to regulate and discourage such police misconduct under the aegis of the Fifth Amendment.

B. Petitioners' Arguments That There Is a Need to Clarify "Conscience Shocking" Behavior Under the Fourteenth Amendment Also Fails to Raise an Issue Worthy of This Court's Review.

1. This Court's Decisions Are Replete with Examples of Verbally Coercive Interrogations Which Violate the Fourteenth Amendment.

Petitioners assert that the Ninth Circuit's opinion in this case creates uncertainty and confusion about what conduct is sufficiently "conscience shocking" to warrant Fourteenth Amendment liability. They premise that argument on the assertion that "verbal" coercion and deception should not be enough, even where juveniles are the target of that coercion.

But over a half-century ago in *Haley*, this Court found that a 15-year-old boy – *based upon verbal coercion alone* – was necessarily ill-equipped to withstand an overnight police interrogation resulting in his coerced confession. *Haley*, 332 U.S. at 599-600. Writing for the Court, Justice Douglas reasoned that such a juvenile "cannot be judged by the more exacting standards of the law," and further observed "[t]hat which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early

teens." *Id.* Recognizing both that such a boy "questioned through the dead of night by relays of police, is a ready victim of the inquisition," and that while "mature men possibly might stand the ordeal . . . a lad of tender years is no match for the police in such a contest," the *Haley* court demanded that "*special care* in scrutinizing the record must be used" in order to protect the constitutional rights of juveniles, and to prevent the police from using custodial interrogations for "wringing confessions from them." *Id.* at 599-601 (emph. added).

Not 14 years later, in *Gallegos v. Colorado,* 370 U.S. 49 (1962), this Court was again called upon to scrutinize a confession wrought from a juvenile in the course of a custodial police interrogation. Finding that the youth of the accused – 14 years old – was a "crucial factor" in determining whether due process violations had occurred, the *Gallegos* court reasoned:

> [A] 14 year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and is unable to know how to protect his own interests or how to get the benefit of his constitutional rights.

Id. at 1212.

Over the prosecution's continuing assertion that such youth and immaturity were "irrelevant" in light

of the allegedly "voluntary" nature of the confession made, the *Gallegos* court retorted:

> But if we took that position, it would, with all deference, be in callous disregard of this boy's constitutional rights. He cannot be compared with an adult in full possession of his senses, and knowledgeable of the consequences of his admissions.

Id. at 1212-1213.

Consequently, *Gallegos*, like *Haley* before it, concluded that "the formal confession on which this conviction may have rested was obtained in violation of due process." *Id.* at 1213.

Not four years later, the Court in *In re: Gault*, 387 U.S. 1, again stressed the importance that youth plays in determining whether a confession is coerced, and echoed the mandate that "the *greatest care*" must be taken to assure that juvenile confessions are "voluntary, in the sense not only that [they are] not coerced or suggested, but also that [they are] not the product of ignorance of rights or of adolescent fantasy, fright or despair." *Gault,* 387 U.S. at 55 (emph. added). That "greatest care" standard was based upon this Court's review of several lower court decisions confirming how juvenile confessions are often "the product of fear and fatigue due to extensive police grilling," and how "the frightening atmosphere of a police station is likely to have a harmful effect on the mind and will of the boy." *Id.* at 52-53 (internal quotes omitted). And so the *Gault* court, too,

concluded with the continuing recognition that "authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children." *Id.*

In the several decades since *Haley, Gallegos*, and *Gault*, other courts have universally followed this same line of reasoning, insisting that the law view juveniles differently than their adult counterparts.[5] Most notably, however, is the fact that the police conduct in those cases was "verbal," as it was in this case. Indeed, as this Court has repeated many times, coercion can be mental as well as physical, as "the blood of the accused is not the only hallmark of an

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[5] See, *e.g.*, *Woods v. Clusen*, 794 F.2d 293, 296-298 (7th Cir. 1986), (finding that various coercive police techniques – relays of police interrogators, lying about the state of the evidence, promises of leniency – violated a 16-year-old's Fourteenth Amendment rights, given his relative age, experience, and education); *Taylor v. Maddox*, 366 F.3d 992, 1013-1016 (9th Cir. 2004) (applying *Haley's "greatest care"* standard to reject a coerced confession wrought from a 16-year-old juvenile and ultimately finding that the police had clearly violated the juvenile's Fourteenth Amendment rights. Secondary authority is also in accord. See 87 A.L.R.2d 624, *Voluntariness and Admissibility of Minor's Confessions*; 82 N.C.L. Rev. 891, 944, *The Problem of False Confessions in the Post-DNA World*; see also 30 N.Y.U. Rev.L. & Soc. Change 209, *The Reality of False Confessions – Lessons of the Central Park Jogger Case* (recounting in chilling detail how and why five juvenile boys subjected to heavy-handed police interrogation techniques confessed their involvement in an infamous crime they did not commit, and were prosecuted and convicted on the basis of those confessions alone, until the real killer, a serial rapist and convicted murderer, confessed to the crime some thirteen years later.)

unconstitutional inquisition." See, *e.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991); *Reck v. Pate*, 367 U.S. 433, 440-441 (1961); *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960).

Here, the Ninth Circuit concluded from the record before it that Michael's and Aaron's confessions were the product of "psychological torture," and that "[o]ne need only read the transcripts of the boys' interrogations, or watch the videotapes, to understand how thoroughly the defendants' conduct in this case 'shocks the conscience.'" (App. 47.)

On that record, and in light of the clearly established standards governing even verbal coercion which run through myriad decisions of this Court, there is absolutely no need for this Court's intervention at this time.

2. Petitioners' Companion "Shocks the Conscience" Arguments Warrant Even Less Scrutiny by This Court.

Petitioners badly mischaracterize the Ninth Circuit's opinion and the record below to float two companion arguments, neither of which warrants this Court's review. Specifically, Petitioners assert that a Fifth Amendment violation based upon coercive interrogation techniques, and a Fourteenth Amendment violation based upon deprivation of familial companionship, cannot be found absent conscience shocking behavior.

But those arguments belie the fact that the Ninth Circuit, in finding that Petitioners violated Michael's and Aaron's Fifth Amendment rights, necessarily relied upon the same conscience shocking behavior that also formed the basis for Petitioners' violation of the boys' Fourteenth Amendment rights. In other words, the same coercive interrogation techniques employed by Petitioners amounted to violations of *both* Constitutional protections, given the egregious nature of that conduct. That this is so does not indicate that this case is at variance with any other decisions, but merely reflects the compelling facts which were before the Ninth Circuit, implicating both Fifth Amendment and Fourteenth Amendment protections.

Similarly, Petitioners' assertion that a deprivation of familial companionship claim under the Fourteenth Amendment requires conscience shocking behavior – and not mere "unwarranted interference" – is also an inadequate grounds for review. Indeed, in this case, it was the Petitioners' conscience shocking and coercive interrogation tactics which the Ninth Circuit found to have caused Aaron's wrongful incarceration and concomitant separation from his family. (See App. 69 ["Because Michael's and Aaron's continued detentions were wrongfully justified by their illegally coerced confessions, we reverse"].) Thus, although the Ninth Circuit applied the proper standard in reinstating that familial relationship claim, even if it were to have applied the "conscience shocking standard" Petitioners espouse, *the outcome would*

have been exactly the same. Accordingly, there is no reason for this Court to intervene on facts which would compel the same outcome, irrespective of the standard applied.

C. The Ninth Circuit's Reversal of Summary Judgment on the Conspiracy Claim Asserted Against Blum Was Entirely Fact-Driven and Therefore Presents No Legal Issue for This Court to Clarify.

Blum's individual argument – that as a private citizen, he cannot be held liable for conspiracy to violate Michael's and Aaron's constitutional rights – is presented without regard to the controlling standard of review at summary judgment. Indeed, Blum recites at length improper factual findings made by the District Court as if they had been made after trial. In contrast, the Ninth Circuit simply determined that genuine questions of material fact exist regarding the level and extent of Blum's involvement which could not be determined at summary judgment, and reversed the District Court on that basis. (App. 66-68.)

Rather than running contrary to this Court's decision in *Richardson v. McKnight,* 521 U.S. 399, 412 (1997), that conclusion by the Ninth Circuit only confirms that Blum is not automatically entitled to § 1983 immunity merely because he is a private individual, as was his primary argument on appeal. Moreover, as Blum's own petition reveals, such a

holding is not a matter of controversy, but has been echoed in the decisions of "nearly every other Circuit Court" which has considered the issue. Thus, the compulsion for this Court's review is clearly lacking.

Perhaps more importantly, however, is the fact that the Ninth Circuit did not deny Blum qualified immunity based upon a "blanket prohibition" that private actors are never entitled to such immunity, as Blum contends. Indeed, the cases which Blum cites hold to the contrary. See, *e.g., Franklin v. Fox,* 312 F.3d 423, 445 (9th Cir. 2002) (which Blum claims applied a "blanket denial of qualified immunity to [a] private individual," but which instead upheld the district court's grant of summary judgment upon a finding that no evidentiary basis existed for the conspiracy claim the plaintiff had asserted as the sole basis for § 1983 liability against that individual); *Clement v. City of Glendale,* 518 F.3d 1090, 1096-1097 (9th Cir. 2008) (which Blum also asserts demonstrates the Ninth Circuit's trend of "blanket denial" of qualified immunity to private individuals, but which instead extended immunity to a private towing company under *Richardson's* "good faith" defense to § 1983 liability).

In any event, notwithstanding whatever post-*Richardson* "blanket prohibition" Blum believes he may have discerned from those decisions, *no such automatic rule played any role here.* Instead, the Ninth Circuit simply concluded that the record evidence regarding Blum's involvement raised factual

questions which could not be properly determined at summary judgment:

> The record shows that the quality of Blum's involvement in the interrogations is not categorically inconsistent with a tacit "meeting of the minds." According to one of the detectives, Blum helped the police formulate a "tactical plan" to approach the interview. Moreover, the detectives "pretty much" followed his advice after these consultations. Insofar as these tactics and lines of questioning by the detectives shock the conscience, as demonstrated above, summary judgment in favor of Blum is unwarranted.

(App. 67.)

Thus, in determining that a meeting of the minds could be inferred from the circumstantial evidence (including Blum's involvement in the interrogations and in formulating and directing the tactical plan), the Ninth Circuit reasoned that the evidence was sufficient for a reasonable factfinder to conclude it was "unlikely to have been undertaken without an agreement." (App. 67-68.) On that basis alone, the Ninth Circuit quite correctly reversed summary judgment as to Blum. There is nothing controversial about that proper application of well-settled summary judgment standards. Consequently, there is no issue of law for this Court to clarify now.

IV. CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant their various petitions. For the foregoing reasons, Respondents respectfully request this Court to deny those petitions.

Respectfully submitted,

BOUDREAU WILLIAMS LLP
JON R. WILLIAMS, ESQ.
Counsel of Record
666 State Street
San Diego, CA 92101
(619) 238-0370 (phone)
(619) 238-8181 (facsimile)
williams@bwlawllp.com

SCHOVILLE & ARNELL, LLP
DENNIS A. SCHOVILLE, ESQ.
LOUIS G. ARNELL, ESQ.
2404 Broadway
San Diego, CA 92101
(619) 232-9901 (phone)
(619) 232-9904 (facsimile)

Attorneys for Respondents, Aaron Houser, Margaret Susan Houser, and Gregg Houser

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MARK WRISLEY, et al.,

Petitioners,

v.

MICHAEL CROWE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

HORVITZ & LEVY LLP
JASON R. LITT
JAMES A. SONNE
Counsel of Record
15760 Ventura Boulevard, 18th Floor
Encino, California 91436-3000
(818) 995-0800
FAX: (818) 995-3157
jsonne@horvitzlevy.com

DALEY & HEFT LLP
RICHARD J. SCHNEIDER
GOLNAR J. FOZI
462 Stevens Avenue
Suite 201
Solana Beach, California
92075-2065
(858) 755-5666
FAX: (858) 755-7870

OFFICE OF THE CITY ATTORNEY
JEFFREY R. EPP
MICHAEL R. MCGUINNESS
OFFICE OF THE CITY ATTORNEY
201 North Broadway
Escondido, California 92025
(760) 839-4608
FAX: (760) 741-7541

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PETITIONERS' REPLY BRIEF 1

I. REVIEW IS NEEDED TO DETERMINE WHETHER POLICE ARE SUBJECT TO CIVIL LIABILITY UNDER THE FIFTH AMENDMENT FOR COERCIVE QUESTIONING WHENEVER THE STATEMENTS THEY OBTAIN ARE USED IN COURT 4

II. REVIEW IS NEEDED TO DETERMINE WHAT TYPE OF ACTIVITY CAUSES POLICE TO BE EXPOSED TO CIVIL LIABILITY UNDER THE FIFTH AMENDMENT 7

III. REVIEW IS NEEDED TO DETERMINE WHETHER VERBAL CONDUCT ALONE CAN "SHOCK THE CONSCIENCE" FOR PURPOSES OF FOURTEENTH AMENDMENT LIABILITY 9

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Braley v. City of Pontiac, 906 F.2d 220 (6th Cir. 1990) 10

Burrell v. Virginia, 395 F.3d 508 (4th Cir. 2005) 1, 4, 5, 6

Chavez v. Martinez, 538 U.S. 760 (2003) ..... *passim*

Cnty. of Sacramento v. Lewis, 523 U.S. 833 (1998) 10, 11

Collins v. City of Harker Heights, Tex., 503 U.S. 115 (1992) 9

Dickerson v. United States, 530 U.S. 428 (2000) 5

Gallegos v. Colorado, 370 U.S. 49 (1962) 12

Giuffre v. Bisell, 31 F.3d 1241 (3d Cir. 1994) 5

Gochicoa v. Johnson, 238 F.3d 278 (5th Cir. 2000) 5, 6

Haley v. Ohio, 332 U.S. 596 (1948) 12

Higazy v. Templeton, 505 F.3d 161 (2d Cir. 2007) 4

In re Gault, 387 U.S. 1 (1987) 12

McKinley v. City of Mansfield, 404 F.3d 418 (6th Cir. 2005) 6

Murray v. Earle, 405 F.3d 278 (5th Cir. 2005) 1, 4, 5, 6, 8

Offineer v. Kelly, ___ F.Supp.2d ___, 2010 WL 3860611 (S.D. Ohio Sept. 24, 2010) 6

TABLE OF AUTHORITIES – Continued

Page

Paul v. Davis, 424 U.S. 693 (1976) 10

Pearson v. Callahan, 129 S.Ct. 808 (2009).....7, 9

Renda v. King, 347 F.3d 550 (3d Cir. 2003) 1, 4, 5, 6

Rochin v. California, 342 U.S. 165 (1952) 12

Sornberger v. City of Knoxville, Ill., 434 F.3d 1006 (7th Cir. 2006) 4

Stoot v. City of Everett, 582 F.3d 910 (9th Cir. 2009) 2, 4

Tinker v. Beasely, 429 F.3d 1324 (11th Cir. 2005) 12

Wilkins v. May, 872 F.2d 190 (7th Cir. 1989).....10

Wilson v. Lane, 526 U.S. 603 (1999).....11

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V .....*passim*

U.S. Const. amend. XIV .....*passim*

PETITIONERS' REPLY BRIEF

The time has come for this Court to resolve the questions left unanswered in *Chavez v. Martinez*, 538 U.S. 760 (2003).

Since *Chavez*, at least six circuit courts have split on whether police officers should face civil liability under the Fifth Amendment for the pre-trial use of allegedly coerced confessions. The Ninth Circuit and two additional circuits say pre-trial use of a coerced confession can lead to liability, while three other circuits hold that only trial use suffices.

Respondents contend that if one examines under a microscope the three opinions disagreeing with the Ninth Circuit and holding that trial use is a prerequisite to liability, one would discover a disagreement only in dicta. Respondents make this argument because they cannot dispute the plain language of those opinions, which contrary to the Ninth Circuit here, states the elements of a Fifth Amendment claim in their respective circuits as requiring use at trial. *See Murray v. Earle*, 405 F.3d 278, 289 (5th Cir. 2005) ("*at trial*" use required); *Burrell v. Virginia*, 395 F.3d 508, 514 (4th Cir. 2005) ("*trial* action" required); *Renda v. King*, 347 F.3d 550, 559 (3rd Cir. 2003) ("it is the use of coerced statements during a criminal trial, and not in obtaining an indictment, that violates the Constitution").

The language of the circuit opinions requiring use at trial for Fifth Amendment liability – as explained below – is not dicta. Indeed, the Ninth Circuit

has cited these opinions in acknowledging the "mixed results" in the circuits over the use question. *Stoot v. City of Everett*, 582 F.3d 910, 924 (9th Cir. 2009). But even if the at-trial requirement in these opinions was dicta, it guides the actions of public officials living and working in at least fifteen states. Do respondents really contend that a police officer in Philadelphia, Richmond, or New Orleans should not only be responsible for knowing what constitutes clearly established law, but also when to ignore the plain language of their courts? Only this Court can eliminate the uncertain and contradictory standards currently being applied throughout the country and set the proper rule for all courts and public officials.

Regardless of its answer on the use question, this Court must also resolve the other Fifth Amendment matter left open in *Chavez*, which is the second question presented by petitioners. Given the fractured Court in *Chavez*, there is no clarity on the question whether a police officer who interviews a suspect in violation of the Fifth Amendment is automatically exposed to civil liability, or whether the officer's conduct must also "shock the conscience" to open him up to a damages action.

Respondents ignore this vital question of Fifth Amendment liability standards, contending it is irrelevant given the Ninth Circuit's holding that the evidence in this case supports a finding that the interrogations meet the (more stringent) shocks-the-conscience test. But this only begs the question of whether that holding was correct, which is the third

question presented. In any event, even if this Court were to agree with the Ninth Circuit's characterization of the interviews as conscience-shocking, it should reject the Ninth Circuit's conclusion that an invalid confession – regardless of circumstances – can automatically yield a civil claim.[1]

Finally, as to petitioners' third question presented – i.e., whether the Ninth Circuit properly applied the Fourteenth Amendment – respondents cite no authority supporting the court's controversial holding that words alone can yield civil liability. They offer cases that stress consideration of a suspect's age when reviewing incriminating statements. But those cases concern only whether the statements should be suppressed as evidence at a suspect's criminal trial, not whether police should be liable for damages.

Here, three Ninth Circuit judges found the questioning conscience-shocking, but the district court judge flatly disagreed. At a minimum, the matter should not be left to the varied sensibilities of individual judges. Rather, this Court should determine whether verbal conduct alone can meet a

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[1] Respondents likewise defend the Ninth Circuit's erroneous use of the "unwarranted interference" test for familial companionship due process claims by contending the court's shocks-the-conscience holding makes any use of this (lower) standard immaterial. But this again begs the question whether that holding was correct and also leaves unaddressed for future parties the Ninth Circuit's erroneous test for companionship claims.

shocks-the-conscience test that was developed chiefly for cases involving physical harm, particularly where, as here, there is no finding of intentional or severe suffering devoid of any valid public interest.

I. REVIEW IS NEEDED TO DETERMINE WHETHER POLICE ARE SUBJECT TO CIVIL LIABILITY UNDER THE FIFTH AMENDMENT FOR COERCIVE QUESTIONING WHENEVER THE STATEMENTS THEY OBTAIN ARE USED IN COURT.

Justice Thomas observed in *Chavez* that because there was majority agreement that the pre-charge questioning there did not violate the Fifth Amendment, "[w]e need not decide today the precise moment when a 'criminal case' commences" under that Amendment. 538 U.S. at 766-67. Justice Souter referenced "the core guarantee" of the Fifth Amendment, but refrained from speculating further on post-charge use. *Id.* at 778 (Souter, J., concurring). Yet that issue, described by circuit courts as "open," "unanswered," or "the gray area created by *Chavez*," has festered with "mixed results" squarely presented here. *Renda*, 347 F.3d at 559; *Sornberger v. City of Knoxville, Ill.*, 434 F.3d 1006, 1025-26 (7th Cir. 2006); *Stoot*, 582 F.3d at 923-26; *see also Higazy v. Templeton*, 505 F.3d 161, 172 (2nd Cir. 2007); *Murray*, 405 F.3d at 289; *Burrell*, 395 F.3d at 514.

Respondents try to minimize the split in authority by claiming the cases opposed to the Ninth Circuit do not in fact involve pre-trial use. (Crowe Opp.

11-19; Houser Opp. 20-27.) Respondents misread the cases. The Third Circuit in *Renda* expressly observed that, unlike the statements in *Chavez*, those by Renda were used to file charges, but the court still rejected liability based on no trial use. 347 F.3d at 558-59.[2] Likewise, in the course of rejecting liability for pre-trial use of an interrogation, the Fourth Circuit in *Burrell* observed, "[u]nlike in *Chavez*, criminal charges *were* ultimately brought against Burrell." 395 F.3d at 513 n.4. Finally, the Fifth Circuit in *Murray* articulated a multi-part test for civil liability, which "require[d]" Murray to establish her coerced statements were used "*at trial*." 405 F.3d at 289. The fact that Murray failed to meet a separate element of the Fifth Circuit's test – proximate causation – does not make its test dicta. *See Gochicoa v. Johnson*, 238 F.3d 278, 286 n.11 (5th Cir. 2000) (observing that *stare decisis* requires fidelity of future

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[2] The Crowe respondents claim *Renda* is limited because it concerns only *Miranda* violations, which they argue fail to establish liability in any event given this Court's "later decision in *Chavez*." (Crowe Opp. 13.) But not only was *Renda* decided after *Chavez*, the *Miranda* violations in *Chavez*, unlike in *Renda*, never led to criminal charges. The Houser respondents also try to limit *Renda* by criticizing its reliance on an identical holding in *Giuffre v. Bisell*, 31 F.3d 1241 (3rd Cir. 1994). They contend if the *Renda* court had only considered this Court's decision in *Dickerson v. United States*, 530 U.S. 428 (2000), which reaffirmed *Miranda*, it would have rejected *Giuffre*, which had doubted *Miranda*'s constitutional force. (Houser Opp. 21.) They are wrong. The *Renda* court expressly stated that despite *Dickerson*, "it is clear that *Giuffre* still is good law." 347 F.3d at 557.

circuit panels to both the results and principles of law from prior panel decisions).[3]

Moreover, even if particular facts could distinguish some of these cases on the use issue, there is no denying the unequivocal statements of law by these courts – in direct conflict with the Ninth Circuit here, the Second Circuit in *Higazy*, and the Seventh Circuit in *Sornberger* – that no liability arises under the Fifth Amendment absent use of illicit statements at trial. *See Murray*, 405 F.3d at 289 (coerced statement must "later be introduced against [plaintiff] *at trial*" for liability to arise); *Burrell*, 395 F.3d at 514 (without "*trial* action," claim fails "*ipso facto*"); *Renda*, 347 F.3d at 559 ("it is the use of coerced statements during a criminal trial, and not in obtaining an indictment, that violates the Constitution"); *see also McKinley v. City of Mansfield*, 404 F.3d 418, 430 n.11 (6th Cir.

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[3] Under respondents' view of dicta, only cases that are factually identical would be binding authority. This is an incorrect application of the concept. *See Gochicoa*, 238 F.3d at 286 n.11 (dicta is limited to statements that can be omitted "'without seriously impairing the analytical foundations of the holding'") (quoting *In re Cajun Elec. Power Coop., Inc.*, 109 F.3d 248, 256 (5th Cir. 1997)). Moreover, at least one court has addressed a Fifth Amendment claim based on the exact situation here – i.e., allegedly coerced statements used to indict but suppressed at trial, where plaintiff was then acquitted – and squarely disagreed with the Ninth Circuit's position, rejecting the claim for lack of trial use. *See Offineer v. Kelly*, No. 09CV493, ___ F.Supp.2d ___, 2010 WL 3860611, *11 (S.D. Ohio Sept. 24, 2010).

2005) ("thrust" of *Chavez* is that Fifth Amendment is only a "trial protection").

The contradictory approaches taken in the circuits – whether in dicta or in a holding – are of particular concern in the qualified immunity context, where a court's opinion affects not only the litigants in a given case but all police activity in that circuit. The discretion afforded to police turns on their understanding of "clearly established" rights. *Pearson v. Callahan*, 129 S.Ct. 808, 822 (2009). To expect police to ignore clear statements of law by courts under which they perform their duties is absurd. Any reasonable police officer would recognize the circuit split on pre-trial use liability under the Fifth Amendment even if respondents would have this Court ignore it.

II. REVIEW IS NEEDED TO DETERMINE WHAT TYPE OF ACTIVITY CAUSES POLICE TO BE EXPOSED TO CIVIL LIABILITY UNDER THE FIFTH AMENDMENT.

In holding the pre-trial use of questioning in this case can result in civil liability under the Fifth Amendment, the Ninth Circuit adopted "mere coercion" as its substantive test. (Pet. App. 36.) The court observed, "a Fifth Amendment cause of action . . . arose when Michael and Aaron's *coerced statements* were introduced." (*Id.* at 44, emphasis added.) And, with regard to qualified immunity, the Ninth Circuit held the Escondido police officers should have known civil liability would arise as soon as they "employed

coercive means to compel a statement." (*Id.* at 44-45.) At no point did the Court of Appeals suggest petitioners' conduct must also "shock the conscience." (*See id.* at 45-48.)[4]

As described in the petition, both the plurality opinion of Justice Thomas and the concurring (and controlling) opinion of Justice Souter in *Chavez* suggest that constitutional claims based on the nature of police conduct during an interrogation should be governed by substantive due process standards, not technical violations of the Fifth Amendment. (Pet. 25-26, citing *Chavez*, 538 U.S. at 773, 779 (Souter, J., concurring).) The definitive test nevertheless remains an unresolved question on which courts of appeal are split. *Compare* Pet. App. 39-45 (using "mere coercion"), *with Murray*, 405 F.3d at 290 nn.39-40, 52 (considering police conduct a Fourteenth Amendment issue). If the Ninth Circuit's view prevails, police could face a civil lawsuit whenever a suspect's statement is subject to suppression – broadening liability well beyond what the majority of justices believed appropriate in *Chavez*.

Respondents never address the explosive expansion of civil liability endorsed by the Ninth Circuit's

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[4] By reversing summary judgment on the Fifth Amendment claim based on the questioning of Houser, whose incriminating answers, if any, were suppressed for his criminal trial not because of coercion but for failure to give *Miranda* warnings (*see* Pet. App. 32), the Ninth Circuit suggests even a mere *Miranda* violation can support a damages action.

coercion test under the Fifth Amendment. Rather, they argue any such holding is irrelevant because the court also found petitioners' conduct – albeit based on facts interpreted in the light most favorable to respondents – violated the shocks-the-conscience test of the Fourteenth Amendment. (Houser Opp. 36-38.) As discussed in the next section, purely verbal conduct does not meet the established shocks-the-conscience standard as a matter of law. More importantly, whether or not petitioners' conduct met the test under the Fourteenth Amendment, the legal standard applied by the Ninth Circuit required no such finding. Instead, the Ninth Circuit made clear that even technical violations of the Fifth Amendment subject police to civil liability. Because that legal standard is wrong and proper exercises of discretion under the shield of qualified immunity depend on an understanding of "clearly established" law, guidance by this Court is critical. *Pearson*, 129 S.Ct. at 822.

III. REVIEW IS NEEDED TO DETERMINE WHETHER VERBAL CONDUCT ALONE CAN "SHOCK THE CONSCIENCE" FOR PURPOSES OF FOURTEENTH AMENDMENT LIABILITY.

This Court "has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking . . . are scarce and open-ended." *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992). Specifically, in the context of the shocks-the-conscience test for police

conduct, the Court has stressed that substantive due process is not a "font of tort law." *Paul v. Davis*, 424 U.S. 693, 701 (1976). Consequently, "only the most egregious official conduct" suffices. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

Here, the Ninth Circuit held words alone can shock the conscience. (Pet. App. 45-53.) This forces police officers to stand trial for engaging in the otherwise valid interview tactics used by petitioners (e.g., misleading suspects on evidence, offering help for cooperation), with no consideration of the officers' purpose or intent in the questioning. (Pet. 33-35.) This ruling is out of step with other circuits and must be reviewed. (*Ibid.*) *See also Braley v. City of Pontiac*, 906 F.2d 220, 226 (6th Cir. 1990) (doubting use of shocks-the-conscience test "outside the realm of physical abuse"); *Wilkins v. May*, 872 F.2d 190, 195 (7th Cir. 1989) (in cases of mental harm, plaintiff must at least show intent to cause "severe mental suffering").

Respondents claim the Ninth Circuit correctly held the questioning here is conscience-shocking because some witnesses called it "psychological torture." (Houser Opp. 32-26.) But, as the district court noted, relevant "conduct must be viewed through a legal and constitutional prism that has been narrowly crafted by the Supreme Court, not through the very different prisms of a lay person and a psychiatrist." (Pet. App. 179.) And the district court reviewed the same evidence and found the questioning here "does not approach" the conscience-shocking level. (Pet. App. 182, 295.) Whatever the proper end result, the

difference of opinion between the appellate and trial courts alone demonstrates the inevitably shaky application of the substantive-due-process inquiry to cases involving no physical harm, much less the resulting loss of qualified immunity. *See Wilson v. Lane*, 526 U.S. 603, 618 (1999) ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.") Certainly this Court should not accept the Ninth Circuit's characterization of the interrogations just because a panel member was a former prosecutor. (*See* Crowe Opp. 25.)

In defending the Ninth Circuit's characterization of the interrogations here, respondents also ignore that all lower courts agreed the Escondido police department acted reasonably in arresting Crowe and Houser for murder. (*See* Pet. App. 48-53.) Perhaps in cases of excessive force a valid arrest is irrelevant, but where only verbal conduct is targeted, context is key. *See Lewis*, 523 U.S. at 850 (demanding "an exact analysis of circumstances before any abuse of power is condemned as conscience shocking"). In the case of Houser, for example, it is undisputed petitioners knew the following before the alleged conscience-shocking interrogation: (1) Houser's mother had called, unsolicited, to report one of his knives was missing; (2) the knife was found under Joshua Treadway's bed; (3) the knife fit the description of the murder weapon; and (4) Treadway told police Houser gave him the knife and said it was used in the murder Houser helped Crowe commit. (Pet. App. 25 n.5,

52-53.) Given that evidence, it would have been irresponsible for the police not to have arrested and questioned Houser in detail. Such facts are critical to evaluating petitioners' actions. *See Tinker v. Beasely*, 429 F.3d 1324, 1329 (11th Cir. 2005) (considering incriminating evidence in shocks-the-conscience analysis of interrogation).

Finally, respondents fail to cite a single case to justify civil liability based on verbal conduct. Rather, they cite authority addressing criteria, such as the suspect's age, for determining the voluntariness of a given statement for evidentiary purposes. (Houser Opp. 32-36, citing *In re Gault*, 387 U.S. 1 (1987); *Gallegos v. Colorado*, 370 U.S. 49 (1962); *Haley v. Ohio*, 332 U.S. 596 (1948).) But whether a confession should be admitted into evidence is distinct from whether the underlying questioning shocks the conscience. *See Tinker*, 429 F.3d at 1328 (distinguishing the two inquiries). If respondents were correct, then every suppression hearing would be a gateway to damages, which would hardly limit recovery to situations "too close to the rack and the screw," as this Court has urged. *Rochin v. California*, 342 U.S. 165, 172 (1952).

CONCLUSION

For all of the foregoing reasons and those described in the petition, petitioners respectfully submit that this Court should grant review.

Respectfully submitted,

HORVITZ & LEVY LLP
JASON R. LITT
JAMES A. SONNE
Counsel of Record
15760 Ventura Boulevard, 18th Floor
Encino, California 91436-3000
(818) 995-0800
FAX: (818) 995-3157
jsonne@horvitzlevy.com

DALEY & HEFT LLP
RICHARD J. SCHNEIDER
GOLNAR J. FOZI
462 Stevens Avenue
Suite 201
Solana Beach, California
92075-2065
(858) 755-5666
FAX: (858) 755-7870

OFFICE OF THE CITY ATTORNEY
JEFFREY R. EPP
MICHAEL R. MCGUINNESS
OFFICE OF THE CITY ATTORNEY
201 North Broadway
Escondido, California 92025
(760) 839-4608
FAX: (760) 741-7541

Counsel for Petitioners

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No. 10-441

In the Supreme Court of the United States

JANICE R.,

Petitioner,

v.

DEBRA H.,

Respondent,

- and -

ANTHONY PARISI III
Attorney for the Child M.R.,

Respondent.

On Petition for a Writ of Certiorari to the New York Court of Appeals

BRIEF OF RESPONDENT DEBRA H. IN OPPOSITION

BONNIE RABIN
ORRIT HERSHKOVITZ
COHEN HENNESSEY BIENSTOCK & RABIN P.C.
11 West 42nd Street, 19th Floor
New York, New York 10036
(212) 575-0007
brabin@chbrlaw.com
ohershkovitz@chbrlaw.com

SUSAN L. SOMMER*
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
120 Wall Street, Suite 1500
New York, New York 10005
(212) 809-8585
ssommer@lambdalegal.org
* *Counsel of Record*

Attorneys for Respondent Debra H.

QUESTIONS PRESENTED

1. In a dispute regarding the parentage of a child born to a couple who had voluntarily entered into a Vermont civil union prior to the child's birth, whether the decision of the New York Court of Appeals to follow New York comity principles and accord respect to Vermont law presents a federal constitutional question for this Court's review, especially when Petitioner failed to preserve her purported federal choice-of-law claim.

2. Whether Petitioner's Due Process rights enunciated in *Troxel v. Granville*, 530 U.S. 57 (2000), were violated by the unanimous decision of the New York Court of Appeals to apply New York comity principles in determining that a child conceived using an anonymous sperm donor and born to a couple who entered into a Vermont civil union prior to the child's birth is the child of both members of the couple.

LIST OF PARTIES TO THE PROCEEDING

In addition to Petitioner Janice R. ("Petitioner" or "Janice") and Respondent Debra H. ("Debra"), included in Petitioner's list of parties provided pursuant to Rule 14.1(b), there is another party to this proceeding, the court-appointed representative of M.R., the seven-year-old child at the center of this case. Anthony Parisi III, the court-appointed attorney for the child ("attorney for the child"), who opposed Petitioner in the state court appellate proceedings, is an additional Respondent pursuant to Rule 12.6.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION 6

I. Petitioner Failed To Preserve The Constitutional Claim Raised In Her First Question Presented, Which Is Also Without Merit Because, Having Voluntarily Submitted To Vermont Civil Union Law, She Is Not Denied Due Process By New York's Giving Comity To It. 6

A. Petitioner Did Not Preserve The Federal Claim She Now Asserts. 6

B. Petitioner's Unpreserved Claim Is Without Merit And Does Not Present An Important Question For Review. 8

II. The Ruling Of The New York Court Of Appeals Is Consistent With *Troxel v. Granville* And Does Not Violate Petitioner's Rights As A Parent.....15

CONCLUSION.....21

TABLE OF AUTHORITIES

CASES

Adams v. Robertson,
520 U.S. 83 (1997) 6, 7, 8

Alison D. v. Virginia M.,
77 N.Y.2d 651,
569 N.Y.S.2d 586,
572 N.E.2d 27 (1991) 11

Allstate Ins. Co. v. Hague,
449 U.S. 302 (1981) 7, 13, 14, 15

B.S. v. F.B.,
25 Misc. 3d 520,
883 N.Y.S.2d 458 (Sup. Ct. 2009) 11

Dickerson v. Thompson,
73 A.D.3d 52,
897 N.Y.S.2d 298 (App. Div. 2010) 11

Godfrey v. Spano,
13 N.Y.3d 358,
892 N.Y.S.2d 272 (2009) 12

Gomez v. Perez,
409 U.S. 535 (1973) 7

In re Estate of May,
305 N.Y. 486,
114 N.E.2d 4 (1953) 13

In re Parentage of L.B.,
155 Wn.2d 679,
122 P.3d 161 (2005) 19

Intercontinental Hotels Corp. v. Golden,
15 N.Y.2d 9,
254 N.Y.S.2d 527,
203 N.E.2d 210 (1964) 12

Kryger v. Wilson,
242 U.S. 171 (1916) 15

Langan v. St. Vincent's Hosp. of N.Y.,
196 Misc. 2d 440,
765 N.Y.S.2d 411 (Sup. Ct. 2003),
rev'd, 25 A.D.3d 90,
802 N.Y.S.2d 476 (App. Div. 2005) 9, 10

Lorie F. v. Raymond F.,
239 A.D.2d 659,
657 N.Y.S.2d 235 (App. Div. 1997) 12

Martinez v. County of Monroe,
50 A.D.3d 189,
850 N.Y.S.2d 740 (App. Div. 2008) 12

Michael H. v. Gerald D.,
491 U.S. 110 (1989) 16

Miller-Jenkins v. Miller-Jenkins,
2006 VT 78,
180 Vt. 441,
912 A.2d 951 (2006) 16, 17, 19

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 14, 15

Richard W. v. Roberta Y.,
240 A.D.2d 812,
658 N.Y.S.2d 506 (App. Div. 1997) 12

Sun Oil Co. v. Wortman,
486 U.S. 717 (1988) 16

Troxel v. Granville,
530 U.S. 57 (2000) ..... *passim*

V.C. v. M.J.B.,
163 N.J. 200,
748 A.2d 539 (2000) 19

Webb v. Webb,
451 U.S. 493 (1981) 7

STATUTES & CONSTITUTION

28 U.S.C. § 1257 6

28 U.S.C. § 1257(a) 6

Due Process Clause,
U.S. Const. amend. XIV, § 1 ..... *passim*

Equal Protection Clause,
U.S. Const. amend. XIV, § 1 7

Full Faith and Credit Clause,
U.S. Const. art. IV, § 1 ..... 6, 7

N.Y. Dom. Rel. Law § 24(1) 12

N.Y. Pub. Health Law § 2805-q(1) 11

N.Y. Pub. Health Law § 2805-q(2)(a) 11, 12

N.Y. Pub. Health Law § 2994-a(7)(a) 11

N.Y. Pub. Health Law § 2994-d(1)(b) 11

N.Y. Pub. Health Law § 4201 11

Sup. Ct. R. 12.6 ii

Sup. Ct. R. 14.1(b) ii

Sup. Ct. R. 14.1(g)(i) 7, 8

Sup. Ct. R. 14.4 7

Vt. Stat. Ann. tit. 15, § 1204(a) 13

Vt. Stat. Ann. tit. 15, § 1204(f) 10

MISCELLANEOUS

Inf. Op. N.Y. Att'y Gen. 2004-1 (Mar. 3, 2004), *available at* http://www.ag.ny.gov/bureaus/appeals_opinions/opinions/2004/informal/2004_1.pdf 9

Leo Tolstoy, *Anna Karenina*
(Constance Garnett trans.,
Barnes & Noble Classics 2003) (1877) 20

INTRODUCTION

Petitioner seeks review in an ongoing custody dispute of a unanimous decision of the New York Court of Appeals rendered purely on state law grounds. The New York high court applied New York comity principles to recognize the Vermont civil union Petitioner voluntarily entered into with Debra while Petitioner was pregnant with the couple's child, conceived using anonymous donor sperm. All seven judges of the court agreed that, consistent with New York law and public policy, the civil union should be accorded recognition for purposes of establishing the parentage of the child born to the couple in New York, where they all reside.

Petitioner did not even assert below the federal Due Process objections to New York's extension of comity to Vermont law, which she only now raises in point I of her Petition. This Court should reject Petitioner's attempt in this family law dispute to transform into a federal case a state court's interpretation of its own state comity principles. The Petition should be denied because (1) it relies on purported federal constitutional claims not preserved below and without any merit, (2) it presents neither an important nor an incorrectly decided federal question or other compelling reason for this Court to review a state choice-of-law ruling in the family law context, where states are accorded particular deference, (3) there is no conflict between the New York ruling and decisions of other state or federal appellate courts or of this Court, and (4) the case is an especially poor candidate for review, given

its highly fact-bound circumstances unlikely to arise again and the ongoing proceedings on remand.

STATEMENT OF THE CASE[1]

Janice and Debra were a committed same-sex couple who together planned for M.R.'s conception by Janice using an anonymous sperm donor.[2] Although Janice later denied it, before M.R. was even conceived she promised that when the baby was old enough Debra would enter into a second-parent adoption, as is permitted under New York law, and that Debra would always be the child's second parent. App. 55a, 57a-58a; R. 121 ¶ 5. Janice moved into Debra's apartment, where the couple furnished their expected baby's nursery, and the couple registered as New York City domestic partners. App. 54a.

In November 2003, when Janice was eight months pregnant, she and Debra travelled to Vermont to enter into a civil union together. App. 54a. At that time a Vermont civil union was the most significant state-conferred legal relationship

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[1] Janice makes a number of misrepresentations and omissions in her Statement of the Case and fails to acknowledge sharp fact disputes regarding a number of her allegations. The Court of Appeals opinion summarizes facts material to its decision. *See* App. 1a-6a, 21a-24a. The New York State Supreme Court opinion also recounts in detail the parties' factual assertions. *See* App. 54a-65a.

[2] Contrary to Petitioner's contention, Pet. 7, M.R. was conceived using *in vitro* fertilization at a clinic in New Jersey, not in New York. *See* Record on Appeal before the New York Court of Appeals ("R.") 902.

available anywhere in the nation to a same-sex couple. Janice concedes that *both* "parties chose to avail themselves of the Vermont civil union statute." Pet. 25. Janice, herself a lawyer, claims to have first conducted legal research and conferred with an attorney about the legal consequences in New York of entering into a civil union. App. 23a-24a. As discussed in point I below, at that time the only New York case to address the question had accorded comity to the Vermont civil union of New York residents. Debra understood and expected that the civil union would provide protections for their child equivalent to those flowing from marriage, and certainly believed Janice understood this as well. R. 906 n.8. As the Court of Appeals noted, "Whatever her motivation or expectation, Janice R. chose to travel to Vermont to enter into a civil union with Debra H." App. 24a.

In the state court proceedings, Debra presented extensive witness affidavits and documentary evidence showing that, in addition to entering into a civil union in advance of M.R.'s birth, the couple in many other ways evinced their intention that Debra would be M.R.'s second parent, and that Debra in fact functioned as his parent. R. 119-552, 560-66, 890-1161. For example, Debra was actively involved in M.R.'s prenatal care and birth, cutting the umbilical cord and staying overnight in the hospital room with Janice and their new baby. App. 57a; R. 220. Janice arranged for Debra's last name to be M.R.'s middle name on his birth certificate. App. 54a; R. 669 ¶ 29. In the months and years that followed, Debra and Janice raised M.R. together, both as his parents. App. 58a-59a. Debra was

identified with Janice as M.R.'s parent on birth announcements; in religious ceremonies and certificates; in numerous cards Janice herself wrote to Debra; on school and camp lists and forms; to health care professionals, family and friends; and to M.R. himself. App. 58a-59a. Even after the adults' relationship frayed and Janice moved into an apartment near Debra's, the two continued to co-parent together. App. 55a-56a. "Both women . . . expected, and led the other to expect, that both of them would be the child's parents." App. 45a (Smith, J., concurring).

When M.R. was nearly four-and-a-half years old, Janice threatened to sever Debra's relationship with him. Debra immediately commenced this proceeding in Supreme Court, New York County, to secure her rights as a parent to custody and visitation and to provide child support. App. 2a. In a decision and order dated October 2, 2008, the trial court ruled that the facts alleged by Debra, if proven to be true at a hearing, establish a *prima facie* basis for applying the doctrine of equitable estoppel to enforce the rights of Debra and M.R. to maintain their parent-child relationship. App. 73a. The court also appointed the attorney for the child to represent M.R. in further proceedings. App. 75a.

Janice appealed to the Appellate Division, which reversed in a decision dated April 9, 2009, holding that the doctrine of equitable estoppel is unavailable in New York to a party who is neither the biological nor adoptive parent of a child. App. 50a-52a.

On September 1, 2009, the New York Court of Appeals granted Debra and the attorney for the child

permission to appeal. App. 6a. On May 4, 2010, all seven judges of that court, in four separate opinions, concurred that the party's Vermont civil union and Debra's resulting parentage of M.R. under Vermont law should be accorded comity in New York. *See* App. 24a-27a (majority), 34a-35a (Graffeo, J., concurring), 36a (Ciparick, J., concurring), 48a (Smith, J., concurring). The majority held that "in this case [we] decide only that New York will recognize parentage created by a civil union in Vermont." App. 27a. In concurrences, three judges opined that, in addition to Debra's parentage established as a matter of comity, New York common-law and equitable principles also afford Debra other avenues for establishing parentage. App. 40a (Ciparick, J., joined by Lippman, C.J.), 46a (Smith, J.). The court concluded that its "determination that Debra H. is M.R.'s parent allows her to seek visitation and custody at a best-interest hearing," and remitted the case to the trial court for that hearing. App. 27a.

Janice's motion for reargument was denied by the Court of Appeals on July 1, 2010. App. 76a. This Petition followed. A forensic evaluation is underway in the trial court, with the best-interest hearing yet to be scheduled.

REASONS FOR DENYING THE PETITION

I. Petitioner Failed To Preserve The Constitutional Claim Raised In Her First Question Presented, Which Is Also Without Merit Because, Having Voluntarily Submitted To Vermont Civil Union Law, She Is Not Denied Due Process By New York's Giving Comity To It.

A. Petitioner Did Not Preserve The Federal Claim She Now Asserts.

Petitioner's first question presented, the argument in support of which comprises the bulk of her Petition, *see* Pet. 2-5, 13-27, was not preserved for review, and thus this Court lacks jurisdiction under 28 U.S.C. § 1257(a) to hear it. Petitioner argues that the state court's choice-of-law determination violates the federal Due Process guarantee. She manufactures this purported federal claim in a last-ditch effort to transform a state law issue into a federal case. Petitioner never raised this federal question at any point in the state proceeding, and nor did the state courts address or rule on it. *See Adams v. Robertson*, 520 U.S. 83, 86 (1997) ("[W]e have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court. . . .").[3]

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[3] Petitioner's first question presented also asserts that the Full Faith and Credit Clause, U.S. Const. art. IV, § 1, was *(cont'd)*

Petitioner's vague Rule 14.1(g)(i) statement is tell-tale proof that she cannot meet her "burden of showing that the issue was properly presented" to the New York Court of Appeals. *Adams*, 520 U.S. at 86. She only generally asserts that the "extra-territorial applicability of the Vermont law" and "[t]he question of giving the Vermont civil union

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violated by the New York court's decision to accord legal respect to the laws of a sister state. The caption of point I, corresponding to the first question presented, references only a Due Process claim, and Petitioner does not explain in her argument what, if any, violation of Full Faith and Credit could have occurred by New York's according comity to Vermont's law, or whether she is even pressing such a claim. Pet. 13. Later, at page 27, for the first time Petitioner vaguely references the Equal Protection guarantee. Petitioner's failure to present with "clarity" the points she proposes to be considered "is sufficient reason for the Court to deny" the Petition. Rule 14.4. Moreover, as with her unpreserved Due Process claim, she never asserted Full Faith and Credit and Equal Protection claims below "at the time and in the manner required by the state law," and so failed to preserve them for this Court's review. *Webb v. Webb*, 451 U.S. 493, 501 (1981). Nor is there any merit to a claim that the New York Court of Appeals violated her rights under these guarantees by according comity to the legal status she voluntarily entered into in a sister state. The protections the court afforded M.R. in recognizing the Vermont civil union his parents entered in anticipation of his birth is not a *deprivation* of Full Faith and Credit and Equal Protection, but the fulfillment of those guarantees. *See, e.g.*, *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 320 (1981) (Full Faith and Credit Clause "implicates the federal interest in ensuring that [the forum state] respect the sovereignty" of a non-forum state by applying the non-forum state's laws) (Stevens, J., concurring); *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (equal protection violated by denying children born outside of marriage rights to parental support).

force as a result of comity" were raised and addressed in decisions below. Pet. 12. This statement does not describe a federal constitutional claim but merely the state law grounds considered by the New York courts and on which the Court of Appeals ultimately based its decision. Notably, contrary to the dictates of Rule 14.1(g)(i), Petitioner never even references the question she raises only now — a purported federal constitutional problem with New York's decision to respect Vermont law — much less the specific places in the record and decisions below where any party or court addressed the issue before. This of course is because her purported federal claim was not once raised or considered below. *See Adams*, 520 U.S. at 86 ("When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented."). Indeed, not one of this Court's decisions on which she relies in point I of the Petition was even cited, much less discussed, in any of the briefing or decisions in the New York courts.

B. Petitioner's Unpreserved Claim Is Without Merit And Does Not Present An Important Question For Review.

It is no surprise that Petitioner's Due Process claim was never raised below, given its palpable lack of merit. The gist of Petitioner's claim is that she could have no "reasonable expectation[]" in November 2003 that her Vermont civil union might be honored by New York courts, and so she was deprived of Due Process when the Court of Appeals determined that the civil union she voluntarily

entered prior to M.R.'s birth is entitled to comity under New York law. Pet. 4.

This unpreserved Due Process claim is contrary to the undisputed facts and state law, as interpreted by the New York Court of Appeals, the final authority on such questions. Janice, a lawyer, concedes that she "chose to avail" herself "of the Vermont civil union statute." Pet. 25. That statute imposed no Vermont residency requirement for entering into a civil union. Having availed herself of a Vermont civil union, Petitioner could not reasonably expect that absolutely no consequences might follow in New York. As the New York court held: "[i]n fact, the potential legal ramifications in New York of entering into a civil union in Vermont were uncertain in 2003." App. 24a. The court explained that the only New York ruling "to consider the consequences in New York of a Vermont civil union was issued in April 2003 — several months before Debra H. and Janice R. entered into their civil union — and was widely publicized." App. 25a n.5. That ruling, *Langan v. St. Vincent's Hospital of N.Y.*, 196 Misc. 2d 440, 765 N.Y.S.2d 411 (Sup. Ct. 2003), *rev'd*, 25 A.D.3d 90, 802 N.Y.S.2d 476 (App. Div. 2005), accorded comity in a wrongful death action to the Vermont civil union entered into by New York residents.[4]

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[4] Indeed, shortly after the parties' civil union and M.R.'s birth, the New York State Attorney General, relying on *Langan*, issued a widely publicized opinion confirming that, "[c]onsistent with the holding of the only state court to have ruled on this question, New York law presumptively requires that parties to such unions must be treated as spouses for purposes of New York law." *See* Inf. Op. N.Y. Att'y Gen. 2004-1, at 16 (Mar. 3, *(cont'd)*

Moreover, *Langan* expressly noted that the Vermont civil union law "include[s] a presumption of legitimacy for either party's natural child born during the union." *Langan*, 196 Misc. 2d at 448, 765 N.Y.S.2d at 417 (citation omitted). *See* Vt. Stat. Ann. tit. 15, § 1204(f) ("The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage."). This directly undermines Janice's claim that, even after reviewing relevant law, she could have no expectation that entering into a civil union when she was pregnant might have ramifications for her child's parentage. "The parties in this case are presumed to have understood the legal ramifications of their decision to enter into a civil union and one of those legal ramifications was that each partner would be a parent of any child born during the union." App. 35a (Graffeo, J., concurring). "[E]ntering into the civil union at a time when both partners know that one of them is pregnant by artificial insemination" permits "no potential for misunderstanding, ignorance or deceit." App. 23a (majority).

Janice misrepresents New York law in many other respects to support her claim that she could have no reasonable expectation that, by entering into a civil union prior to her child's birth and

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2004), *available at* http://www.ag.ny.gov/bureaus/appeals_opinions/opinions/2004/informal/2004_1.pdf.

rearing him with Debra, legally-enforceable rights to maintain a parent-child relationship might vest for Debra and M.R. Although this Court is not the appropriate forum for her to reargue these state law questions, they are, in any event, without merit. For example, contrary to Janice's assertion, Pet. 21-22, and as noted in decisions below, there was significant uncertainty under New York case law, both before and after the time M.R. was conceived, regarding the scope and vitality of *Alison D. v. Virginia M.*, 77 N.Y.2d 651, 569 N.Y.S.2d 586, 572 N.E.2d 27 (1991), and the extent to which parent-child bonds fostered by a legal parent might result in enforceable equitable rights for an adult and child unrelated by biology or adoption. *See* App. 36a-38a (Ciparick, J., concurring), 51a-52a, 67a-72a. Janice is also wrong that civil unions have not been recognized under New York law for dissolution or any other purposes. Pet. 18.[5] She is wrong as well

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[5] *See, e.g.*, *Dickerson v. Thompson*, 73 A.D.3d 52, 56, 897 N.Y.S.2d 298, 301 (App. Div. 2010) (holding that state court has equitable jurisdiction to entertain petition to dissolve New York residents' Vermont civil union); *B.S. v. F.B.*, 25 Misc. 3d 520, 532, 883 N.Y.S.2d 458, 467 (Sup. Ct. 2009) (same); *see also* N.Y. Pub. Health Law §§ 2805-q(1)-(2)(a) (giving same hospital visitation rights of "spouses" to "domestic partners," defined to include those "formally a party in a domestic partnership or similar relationship with the other person, entered into pursuant to the laws of . . . any state"); N.Y. Pub. Health Law §§ 2994-d(1)(b), 2994-a(7)(a) (giving domestic partners same right as spouses to make health care decisions for partners lacking decision-making capacity and defining domestic partner as N.Y. Public Health Law § 2805-q(2)(a) does); N.Y. Pub. Health Law § 4201 (according surviving domestic partners right to make decisions about disposition of remains, and *(cont'd)*

that the presumption of parentage arises under New York law only if the parents marry before the child's conception. Pet. 19.[6] And she is wrong in her claim that "New York has always had a strong policy against affording judicial recognition to same-sex marriages." Pet. 21.[7]

In fact, the New York Court of Appeals applied settled New York comity principles in reaching the predictable conclusion that the civil union should be recognized for purposes of resolving M.R.'s parentage. *See* App. 24a-25a; *see also, e.g., Intercontinental Hotels Corp. v. Golden*, 15 N.Y.2d 9, 17, 254 N.Y.S.2d 527, 533, 203 N.E.2d 210, 214 (1964) (New York follows "consistent practice of enforcing rights validly created by the laws of a sister State which do not tend to disturb our local laws or corrupt the public").

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likewise defining domestic partner as N.Y. Public Health Law § 2805-q(2)(a) does).

[6] *See* N.Y. Dom. Rel. Law § 24(1) (child "born of parents who prior or subsequent to the birth of such child shall have entered into a civil . . . marriage . . . is the legitimate child of both birth parents"); *Richard W. v. Roberta Y.*, 240 A.D.2d 812, 658 N.Y.S.2d 506 (App. Div. 1997) (presumption applied to child conceived prior to marriage); *Lorie F. v. Raymond F.*, 239 A.D.2d 659, 657 N.Y.S.2d 235 (App. Div. 1997) (same).

[7] *See, e.g., Godfrey v. Spano*, 13 N.Y.3d 358, 892 N.Y.S.2d 272 (2009) (upholding recognition of out-of-state marriages of same-sex couples as within government's discretion); *Martinez v. County of Monroe*, 50 A.D.3d 189, 850 N.Y.S.2d 740 (App. Div. 2008) (holding that state common law requires according comity to validly entered out-of-state marriages of same-sex couples).

Notably, in the context of recognition of out-of-state marriages, New York has long followed the place-of-celebration rule, liberally according comity to marriages of New York residents who had no contacts to the marriage jurisdiction other than having entered into their unions there. *See, e.g., In re Estate of May*, 305 N.Y. 486, 490, 114 N.E.2d 4, 6 (1953) (granting comity to Rhode Island marriage of New York uncle-niece couple because, under "settled" New York law, "the legality of a marriage between persons *sui juris* is to be determined by the law of the place where it is celebrated"). New York's strong policy to apply the place-of-celebration rule to recognize a couple's legal status obtained under another jurisdiction's laws obviously offers relevant support for recognition of an out-of-state civil union, even without determining the extent to which New York would equate civil union with marriage. *See* Vt. Stat. Ann. tit. 15, § 1204(a) ("Parties to a civil union shall have all the same benefits, protections, and responsibilities under law . . . as are granted to spouses in a civil marriage.").

This Court's decisions relied on by Petitioner demonstrate that the predictable choice of law made by the state court here did not cause Petitioner to suffer the degree of "unfair surprise or frustration of legitimate expectations" turning a state's choice-of-law determination into a Due Process violation. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 318 n.24 (1981). Significantly, not a single precedent on which Petitioner relies held that the forum state violates the federal Due Process rights of forum residents by extending comity to a sister state's law where the parties had voluntarily availed

themselves of a legal status conferred by the foreign state. Instead, the Due Process precedents cited by Petitioner tested the extent to which that guarantee protects parties who are not residents of the forum state from being disadvantaged by the forum's unanticipated choice of its own law over that of a jurisdiction more favorable to the non-resident. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822-23 (1985) (Kansas's choice to subject out-of-state defendants to Kansas law in multi-state gas lease class action violated Due Process given that parties had no connection to Kansas and could not have anticipated its law might apply); *Hague*, 449 U.S. at 313-20 (Minnesota's choice to subject out-of-state defendant insurer to disadvantageous Minnesota law did not violate Due Process where insurer could not claim unfair surprise at choice of law); *id.* at 326-27 ("[c]oncern about the fairness of the forum's choice of its own rule might arise if that rule favored residents over nonresidents") (Stevens, J., concurring).

Even crediting Petitioner's assertions about her expectations in 2003, at most she simply made a poor legal prediction of how her own state's courts would rule regarding the comity due the civil union she had voluntarily entered. She certainly was not subjected to an "arbitrary" or "fundamentally unfair" choice-of-law determination. *Hague*, 449 U.S. at 313. Nor can she claim she suffered disadvantage at the hands of a foreign forum court parochially favoring its own residents and law.

"State courts . . . constantly must apply and develop general legal principles to accommodate novel factual circumstances with the overarching

goal of achieving a just result." *Shutts*, 472 U.S. at 837 n.19 (Stevens, J., concurring). The New York court's decision to apply the Vermont law of which these New York parties concededly "chose to avail themselves," Pet. 25, "'being purely a question of local common law, is a matter with which this [C]ourt is not concerned.'" *Hague*, 449 U.S. at 332 n.25 (Stevens, J., concurring) (quoting *Kryger v. Wilson*, 242 U.S. 171, 176 (1916)).

II. The Ruling Of The New York Court Of Appeals Is Consistent With *Troxel v. Granville* And Does Not Violate Petitioner's Rights As A Parent.

Petitioner claims in her second point that the Court of Appeals determination that Debra is M.R.'s legal parent violates Petitioner's substantive Due Process rights as a fit parent, in conflict with this Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000). Pet. 28-29. In fact, the state court's decision poses no conflict with the principles enunciated in *Troxel*. While protecting significant constitutional interests of both M.R. and Debra in their parent-child relationship, the New York court's decision in no way violates Janice's constitutional rights.

Troxel invalidated on federal substantive Due Process grounds, as applied to a petition for grandparent visitation, Washington's expansively worded statute allowing "[a]ny person" to seek visitation with a child "at any time," so long as a court determines the visitation to be in the child's best interests. *Troxel*, 530 U.S. at 60, 73 (plurality opinion). A four-judge plurality of this Court opined

that the "breathtakingly broad" scope of the statute failed to give sufficient deference to the judgment of fit parents regarding with whom their children should associate. *Id.* at 67.

Troxel did not address, much less invalidate, state law presuming a child born to a couple in a legally-recognized union to be the child of both partners. None of the Court's opinions in *Troxel* addressed how a state might define parentage. In contrast, in an earlier case, this Court upheld the constitutionality of a presumption of parentage in the spouse of a woman who gives birth to a child during the marriage, even where the presumption operates to establish the legal parentage of a person not biologically related to the child and to exclude the actual biological father. *Michael H. v. Gerald D.*, 491 U.S. 110, 117-30 (1989) (plurality opinion); *id.* at 132-33 (Stevens, J., concurring). In *Michael H.* this Court noted that how to define parental relationships in such contexts is a question of individual state "policy and not constitutional law." *Id.* at 129-30.[8]

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[8] Petitioner complains that the New York court misinterpreted the Vermont Supreme Court's holding in *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, 180 Vt. 441, 912 A.2d 951 (2006), *cert. denied*, 550 U.S. 918 (2007), and should not have read that decision to support a determination that Debra is M.R.'s parent under Vermont law. Pet. 6, 29. Petitioner did not espouse or preserve below her current interpretation of *Miller-Jenkins*. Nor is it this Court's role to intervene to correct one state's interpretation of another state's substantive law. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 730-31 (1988). In any event it is Petitioner, not the unanimous Court of Appeals, who misreads *Miller-Jenkins*. The Vermont court *(cont'd)*

Nor did *Troxel* establish any absolute right of a birth parent to exclude all other persons from custody or visitation, and it certainly did not establish an absolute right entitling a birth parent to exclude another *parent*. *See, e.g.*, *Troxel*, 530 U.S. at 73 (noting that "[w]e do not, and need not, define today the precise scope of the parental due process right in the visitation context.") (plurality opinion). In fact, a number of justices in *Troxel* explicitly differentiated the grandparents' claim before the Court from a custody or visitation claim by a person asserting a substantial parent-child — albeit non-biological or adoptive — relationship. Justice Kennedy, for example, noted that "a fit parent's right vis-a-vis a complete stranger is one thing; *her right vis-a-vis another parent or a de facto parent may be another*." *Id.* at 100-01 (Kennedy, J., dissenting) (emphasis added). Justice Stevens similarly acknowledged the potential claims of a "once-custodial caregiver" or "intimate relation," to whom "it would be constitutionally permissible for a court to award" visitation. *Id.* at 85 (Stevens, J., dissenting); *see also id.* at 77 (Souter, J., concurring) (agreeing with Washington Supreme Court's

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recognized in *Miller-Jenkins* "[m]any factors" establishing the parentage of the non-biological mother in the civil union in that case. 2006 VT 78, ¶56, 180 Vt. at 465, 912 A.2d at 970. The court stressed that "first and foremost" was the undisputed fact "that [the couple] were in a valid legal union at the time of the child's birth." *Id.*; *see also id.* at ¶58, 180 Vt. at 466, 912 A.2d at 971. The court made clear that all the factors it identified need not be present to establish parentage, and that, particularly in light of the parties' civil union, it did not need to determine which may be dispositive in other situations. *Id.*

invalidation of visitation statute on ground that it did "not require the petitioner to establish that he or she has a substantial relationship with the child") (quotations omitted).

The only constitutional rights Petitioner acknowledges even to exist are her own purported interests. Indeed, Petitioner has neglected even to inform the Court that M.R. is represented by counsel who has consistently advocated that the child has a constitutional right to protect his relationship with his second parent. Petitioner ignores the significant constitutional interests M.R. and Debra have in sustaining the parent-child relationship held by the unanimous Court of Appeals to have been legally established as a result of Janice's own actions. A majority of this Court in *Troxel* suggested that the interests of the child and the other significant adult, not only of the birth parent, are relevant in evaluating the birth parent's asserted constitutional claim. *See id.* at 64-65 (plurality) (children are not "'so much chattel'"); *id.* at 77 (Souter, J., concurring); *id.* at 86 (Stevens, J., dissenting) ("There is at a minimum a third individual, whose interests are implicated in every case to which the statute applies — the child."); *id.* at 98 (Kennedy, J., dissenting) ("[A] third party, by acting in a caregiving role over a significant period of time," may establish "a relationship with a child which is not necessarily subject to absolute parental veto.").

This Court also emphasized in *Troxel* the deference due to state courts in defining constitutionally permissible standards to apply to the necessarily fact-bound circumstances presented in such cases. "Because much state-court

adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter." *Id.* at 73 (plurality). "We must keep in mind that family courts in the 50 States confront these factual variations each day, and are best situated to consider the unpredictable, yet inevitable, issues that arise." *Id.* at 101 (Kennedy, J., dissenting).

Consistent with the deference paid to the states in the family law realm, this Court has repeatedly refused to intervene to disrupt the states' ability to determine for themselves how to define parental relationships, including in the context of evolving standards applied to children reared by same-sex partners. *See, e.g.*, *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, 180 Vt. 441, 912 A.2d 951 (2006), *cert. denied*, 550 U.S. 918 (2007); *In re Parentage of L.B.*, 155 Wn.2d 679, 707-08, 122 P.3d 161, 176-77 (2005) (holding under state common law that lesbian partner of birth parent can establish status as second parent of child born in the relationship), *cert. denied*, *Britain v. Carvin*, 547 U.S. 1143 (2006); *V.C. v. M.J.B.*, 163 N.J. 200, 215-17, 748 A.2d 539, 547-48 (2000) (recognizing lesbian "psychological" parent), *cert. denied*, 531 U.S. 926 (2000).

Other than *Miller-Jenkins*, in which the Vermont Supreme Court reached the same conclusion as the New York Court of Appeals that a child born to a civil union couple is the legal child of both partners, Respondent is aware of no other cases in the nation considering presumptions of parentage arising under a civil union law, or the comity accorded across state lines to the parental status so established. Not only

is there no conflict among courts on this subject, but there has been almost no percolation of the issue among state or federal courts that could assist in this Court's analysis.

Indeed, this case is an especially poor vehicle for review given its particularly fact-bound nature. In the words of Tolstoy, "Happy families are all alike; every unhappy family is unhappy in its own way." Leo Tolstoy, *Anna Karenina* 5 (Constance Garnett trans., Barnes & Noble Classics 2003) (1877). It is highly unlikely that the mix of circumstances material to this case, ranging from the timing of the parties' civil union to the status of New York law on civil union recognition at that point, will arise again with any frequency in New York, much less in any other jurisdiction. Moreover, the case has not even run its course in the New York courts, with potentially significant fact-finding and custody and visitation determinations yet to occur. This case, like the circumstances of the particular family involved, is too uncommon to justify *certiorari*.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court deny the Petition.

Respectfully submitted,

BONNIE RABIN
ORRIT HERSHKOVITZ
COHEN HENNESSEY
BIENSTOCK & RABIN P.C.
11 West 42nd Street
19th Floor
New York, New York
10036
(212) 575-0007
brabin@chbrlaw.com
ohershkovitz@chbrlaw.com

SUSAN L. SOMMER*
LAMBDA LEGAL DEFENSE
& EDUCATION FUND, INC.
120 Wall Street
Suite 1500
New York, New York
10005
(212) 809-8585
ssommer@lambdalegal.org

**Counsel of Record*

Attorneys for Respondent Debra H.

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